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## Congressional Intent and Agency Discretion - Never the Twain Shall Meet: The Motor Carrier Act of 1980

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# CONGRESSIONAL INTENT AND AGENCY DISCRETION— NEVER THE TWAIN SHALL MEET: THE MOTOR CARRIER ACT OF 1980

PAUL STEPHEN DEMPSEY\*

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## I. INTRODUCTION

In the summer of 1980, President Carter signed into law one of the most significant pieces of legislation in almost 50 years of surface transport regulation—the Motor Carrier Act of 1980.<sup>1</sup> In many respects this

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1. Pub. L. No. 96-296, 94 Stat. 793 (1980).

The five year period from 1976 to 1981 will be remembered as perhaps the most active in the almost one hundred year history of governmental regulation of transportation. During the decades surrounding the turn of the century, the federal focus was limited to railroads and ocean carriers. Indeed, concern with rail transportation prompted the creation of the nation's first independent regulatory agency, the Interstate Commerce Commission. During the 1930's, federal concern again focused on the problems confronting transportation, leading Congress to regulate

## new law affirms the quasi-judicial relaxation of regulatory standards

several new modes of transport: motor, bus, inland water, and air carriers, as well as freight forwarders and brokers. But the contemporary period is unsurpassed in the history of federal transportation regulation; it is one in which the government is reassessing its role in the regulation of *all* modes of transportation. For example, beginning in the mid-1970s, national concern over the economic health of railroads led Congress to promulgate successive pieces of legislation designed to stimulate the rail industry and avoid future problems of the type experienced by Conrail, the Rock Island, and the Milwaukee Road. Thus, the 4R Act of 1976 and the Staggers Rail Act of 1980 attempted to free the rail industry from excessive governmental intervention, making it possible for the industry to enjoy the economic opportunities available in the marketplace. Congress also freed rail carriers from the obligation of providing passenger service by creating the federally subsidized Amtrak. More recently, Congress has proposed to return Conrail to the private sector under the Northeast Rail Service Act of 1981.

Similarly, the excessively rigid regulatory scheme established by the Civil Aeronautics Board which had, between 1938 and 1975, allowed the creation of an effective oligopoly composed of the five largest trunk line carriers, led Congress to deregulate air transportation under the Air Cargo Deregulation Act of 1977 and the Airline Deregulation Act of 1978. In addition, the possibility exists that Congress may phase out the Civil Aeronautics Board prior to the currently designated date of 1985.

The motor carrier industry has also come under legislative and regulatory scrutiny which culminated in the passage of the Motor Carrier Act of 1980 and the recent Household Goods Transportation Act. This legislative action is designed to encourage a more efficient and competitive surface transportation system, to reappraise legislation which was almost fifty years old, and to eliminate unwarranted governmental intrusion into an industry which is vitally important to the economic growth of the nation.

The House of Representatives has recently passed a bill designed to reevaluate the regulatory scheme involving passenger bus transportation. The Senate is reviewing the recently introduced Shipping Act of 1981, a bill which would reorganize the responsibilities exercised by the Federal Maritime Commission over ocean shipping. Further, Congress may also address the issue of whether coal slurry pipelines should come under federal regulatory jurisdiction.

Few industries have undergone such a comprehensive reevaluation by Congress in such a short period of time as has transportation. This reevaluation represents a concern that government can become archaic in its ways and fail to keep pace with a modern, rapidly growing, industrialized society. Occasionally, it is desirable for Congress to pull out the old statutes and dust them off, to examine the "dinosaur" agencies and revamp them as necessary and to modernize the regulatory structure and improve its organization and procedures in order to ensure that the public interest is best served. It is clearly in the public interest for Congress to maintain a close working relationship with the agencies under its control. The regulatory agencies which govern transportation, including the Interstate Commerce Commission, the Federal Maritime Commission, and the Civil Aeronautics Board, are all independent agencies which carry out the policies of the legislative branch. It is desirable that Congress continue to exercise its oversight responsibilities with respect to these agencies to ensure that government maintains a relationship with business that allows business to function most economically and efficiently.

The Seventh Circuit recently summarized the vitality of legislative activity in the transportation area when it observed:

"Deregulation" is the current "buzzword" with respect to all forms of transportation. Beginning under the Jimmy Carter administration with the Airline Deregulation Act of October 24, 1978, 92 Stat. 1705, 49 U.S.C. 1301 *et seq.* whose title describes it as an Act "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services," the increased reliance on what President Ronald Reagan has called "the magic of the market place" was extended to motor carriers by the Act of July 1, 1980, 94 Stat. 793, 49 U.S.C. 10101, and to railroads by the Act of October 14, 1980, 94 Stat. 1895, 49 U.S.C. 10101 (known, from the name of its Senate sponsor, as the "Staggers Rail Act of 1980"). Likewise, one day later, the Household Goods Transportation Act of October 15, 1980, 94 Stat. 2011, 49 U.S.C. 10101 note . . . was enacted.

Historians might philosophize that excessive reliance upon market forces may prove shortsighted and resurrect some of the ancient evils which led to the enactment in 1887

begun three years before by the majority of recent presidential appointees to the Interstate Commerce Commission, the nation's oldest independent regulatory agency.<sup>2</sup> This liberalization had already begun to swing the pendulum away from protectionism of established carriers from the deleterious effects of excessive competition (a philosophy which had prompted a previous Congress to promulgate the Motor Carrier Act of 1935,<sup>3</sup> which first established ICC jurisdiction over the motor carrier industry) to an ideology which espoused enhanced competition and free market economics. In other respects, the legislation reflects a belief that Congress should specify the parameters within which the ICC may exercise its discretion, and that the flexibility of the ICC to become excessively liberal in its regulatory approach should be constricted.<sup>4</sup> In any event, the 1980 legislation constitutes the culmination of one of the most intensive inquiries ever undertaken by the relevant congressional committees.<sup>5</sup>

Both the statute and its legislative history emphasize that the ICC

of the Interstate Commerce Act in the first place. Was it not the uninhibited operation of marketplace forces which enabled John D. Rockefeller's Standard Oil Company to obtain from railroads a rebate, not only upon its own traffic, but also upon that of its competitors?

North Am. Van Lines, Inc. v. ICC, No. 81-1724, slip op. at 2 (7th Cir. Dec. 9, 1981).

2. The Interstate Commerce Commission was created in 1887. The agency will hereinafter be referred to as the ICC or the Commission.

3. In 1935, the Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, was amended by the Act of Aug. 9, 1935, ch. 498, 49 Stat. 453. This amendment divided the Interstate Commerce Act into two parts. The original Act was designated "Part I." The Motor Carrier Act of 1935 was then added as "Part II." The Motor Carrier Act of 1980 amends the Motor Carrier Act of 1935.

4. See SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, REPORT ON THE MOTOR CARRIER REFORM ACT OF 1980, S. REP. NO. 641, 96th Cong., 2d Sess. 2-3 (1980) [hereinafter cited as SENATE REPORT]. There was, perhaps, also some recognition that the ICC should be prevented from becoming the defiant, radical body that its sister agency, the Civil Aeronautics Board, had already become. See Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91 (1979) [hereinafter cited as *Rise and Fall*]. In fact, the regulatory and statutory developments with respect to air carriers closely (and perhaps frighteningly) parallel those concerning motor carriers.

5. See SENATE REPORT, *supra* note 4, at 2; HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, REPORT ON THE MOTOR CARRIER ACT OF 1980, H.R. REP. NO. 1069, 96th Cong., 2d Sess. I, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2283, 2283 [hereinafter cited as HOUSE REPORT]. The Introduction to the House report provides an insight into the effort Congress devoted to this investigation:

The Motor Carrier Act of 1980 is the product of over 18 months of continuous study of one of the most complex issues ever undertaken by this Committee. In the last 1½ years, 16 days of hearings were conducted, with 215 witnesses presenting the views of nearly every entity in our society touched by this industry. On two of those days, the Committee's hearings were held in Chicago jointly with the Senate Committee on Commerce, Science and Transportation. In addition, thousands of letters from consumers—from beef processor to independent owner-operators—have been received and considered. Through this process, Congress has reaffirmed its role to control and set policy and guidelines for the conduct of interstate commerce.

*Id.*

is to exercise its discretion only within the confines of the powers specifically conferred by the new law. It is also emphasized that the relevant congressional committees shall maintain regular oversight hearings to ensure that the ICC remains within those confines and to monitor the impact of the legislation and ICC's interpretation of it upon the motor carrier industry and the public it serves. The Commission has now begun to apply and interpret the new legislation. This article will endeavor to explore the evolution of substantive policy in the major areas of motor carrier regulation,<sup>6</sup> and will then attempt to discern whether these policies have evolved in a manner consistent with congressional intent.

## II. THE TRADITIONAL ENTRY CRITERIA (1935-1977)

The largest number of proceedings before the ICC involve motor carriers, which numerically compose the most substantial single mode of transport subject to ICC regulation.<sup>7</sup> Federal regulation of motor

6. For an earlier analysis of the ICC's transportation entry policies, see Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729 (1977).

7. See 94 ICC ANN. REP. 99-100 (1980); 93 ICC ANN. REP. 102-03 (1979); 92 ICC ANN. REP. 94-96 (1978); 91 ICC ANN. REP. 101-02 (1977); 90 ICC ANN. REP. 113-14 (1976).

The trucking industry is one of the most important components of the nation's economy. The House report on the Motor Carrier Act of 1980 furnishes an interesting description of the industry: The industry as a whole generates about \$108 billion in revenues annually, or about 75 percent of the revenues earned by all forms of transportation. . . .

The portion of the motor carrier industry subject to regulation by the Interstate Commerce Commission is composed of over 17,000 trucking firms that earned revenues in 1979 of about \$41.2 billion. The regulated motor carriers handled about one billion tons of freight in intercity service in 1979 and logged over 21.5 billion intercity miles. Regulated carries [*sic*] comprise less than 50 percent of the industry. Consequently, the larger part of the industry is not now regulated by the Federal Government.

In 1979, the Commission-regulated truckers owned approximately 950,000 pieces of equipment, composed of about 100,000 trucks, 260,000 tractor units and 590,000 trailers. The Commission-regulated carriers directly employed about 825,000 full-time personnel and thousands of part-time employees. In 1979, these Commission-regulated carriers consumed about 8 billion gallons of fuel, almost 3 billion gallons of gasoline in pickup and delivery operations, and 5 billion gallons of diesel fuel in intercity service.

The regulated industry includes common carriers and contract carriers. These carriers are listed in three classes based upon revenues. The common carriers are subdivided into those who carry general freight, specialized goods, and household goods. In the common carrier category among all Class I and II motor carriers, the specialized carriers are greater in number than general freight carriers. They handle more tonnage than general freight and log approximately an equal number of miles. However, the general freight carriers earn two-thirds of industry revenue. The general freight carriers have two-thirds of the assets and equipment, and employ almost 80 percent of all personnel. They also earn 70 percent of the net income. These differences are understandable considering the different nature of the operating environments of these segments. The general freight segment is characterized by the transportation of small shipments in consolidated lots while the specialized carrier segment is characterized by point-to-point service in truckload lots.

Contract carriers are the other significant segment of the regulated industry. A con-

carriers was initiated with the promulgation of the Motor Carrier Act of 1935. Among the purposes of this legislation were the prevention of destructive competition among motor carriers and the protection of motor and rail carriers from each other.<sup>8</sup>

tract carrier operates in accordance with contracts signed by himself and the shippers he serves. These carriers enter into continuing contracts with individual shippers and dedicate equipment or provide services designed to meet the specific needs of those shippers.

HOUSE REPORT, *supra* note 5, at 2.

Several members of Congress have made statements highlighting the vital importance of the trucking industry. For example, Senator Howard Cannon declared, "There is virtually nothing worn, eaten or used by the American public that has not at one time or another been transported in a truck. It is no exaggeration to say that the trucking industry is critical to the growth and prosperity of the nation's economy." *Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 1 (1979) (statement of Sen. Howard Cannon). Similarly, Senator Russell Long presented data describing the magnitude of the industry:

In 1978, there were over 28 million vehicles registered as trucks in the United States. Of this number, over 1 million are engaged in for-hire operations and over 16,000 trucking companies are regulated by the Interstate Commerce Commission (ICC). The trucking industry serves over 60,000 communities in the United States, many of which rely on trucking as the sole mode of transportation for freight. In 1978, the trucking industry had revenues in excess of \$35 billion and this figure represented over 50 percent of the total revenues from intercity freight carried by the various transport modes. There are over 9 million individuals engaged in the trucking industry accounting for over \$100 billion in wages each year. The trucking industry is truly a multi-billion-dollar business. Clearly, the trucking industry plays a major role in our economy and our society.

*Id.* at 3 (statement of Sen. Russell Long). And Senator Edward Kennedy, a major proponent of the deregulation of transportation, provided his own estimates of the industry's importance:

Trucking is one of the largest businesses in this nation. Altogether, it generates more than \$100 billion dollars in revenue annually. It is one of the backbones of our national transportation system, accounting for about 78 percent of the total revenues earned by all transportation modes.

Interstate trucking is a \$56 billion dollar a year industry. Approximately half of this amount is generated by the more than 14,000 carriers licensed by the Interstate Commerce Commission to haul regulated freight. The rest is earned by more than 100,000 trucking companies—many of them owner/operators—who haul unregulated freight.

*Id.* at 9 (statement of Sen. Edward Kennedy). See *id.* at 324.

In addition, the following information was provided in the Senate report on the Motor Carrier Act of 1980:

In 1979, revenues of the regulated motor carriers amounted to an estimated \$41.2 billion, or 55 percent of the total regulated intercity freight bill. There are 16,874 federally regulated motor carriers operating 840,000 pieces of equipment. In 1979, these carriers handled over 1 billion tons of freight. Industry mileage approaches 21 billion annually with ton-miles transported at 276 billion. General freight carriers alone handle about 1 million shipments each working day, and 95 percent are less-than-truckload

There are more than 61,000 communities in the United States; and of these, nearly 40,000 or 65 percent, are completely dependent on motor carriers for their freight service.

SENATE REPORT, *supra* note 4, at 85.

8. T. MORGAN, *ECONOMIC REGULATION OF BUSINESS* 66-67 (1976). Another principal impetus for the promulgation of the Motor Carrier Act of 1935 was the decision of the United States Supreme Court in *Buck v. Kuykendall*, 267 U.S. 307 (1925), which eliminated state regulation of transportation in interstate commerce. Prior to *Buck*, "some forty states prohibited motor common carriers of passengers from using their highways without a certificate obtained by a showing that the involved service is required by the present or future public convenience and necessity." Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANS. L.J. 91, 92 (1976). This development paralleled the decision of the Supreme Court in

Prior to the promulgation of the Motor Carrier Act of 1980, an applicant seeking authority to operate as a motor common carrier was required to demonstrate that the proposed operation would be required by the present or future "public convenience and necessity."<sup>9</sup> Because Congress failed to define PC&N,<sup>10</sup> it was the Commission's responsibility to devise quasi-judicial standards to breathe life into this ambiguous statutory terminology.

In *Pan-American Bus Lines Operation*,<sup>11</sup> one of its earliest and most frequently cited decisions, the ICC established three quasi-judicial "common law" considerations to be weighed in determining whether proposed operations satisfied this ambiguous statutory criterion: (1) whether the proposed service would "serve a useful public purpose, responsive to a public demand or need"; (2) whether that purpose could "be served as well by existing lines or carriers"; and (3) whether the applicant could satisfy that purpose "without endangering or impairing the operations of existing carriers contrary to the pub-

Wabash, St. L. & Pac. Ry. v. Illinois, 118 U.S. 557 (1886), which prompted Congress to regulate rail carriers in 1887. See Harris, *Introduction*, 31 GEO. WASH. L. REV. 1, 13-15 (1962). It is usually argued that monopolists should be regulated so as to prohibit accumulation of excess profits, and to increase production at a price lower and a quantity higher than that at which marginal costs equal marginal revenues (so as to approach a situation comparable to that of a competitive market) so that maximization of social benefits and minimization of waste can be achieved. The regulation of natural monopolists, such as those who provide service on certain rail lines for market dominant traffic, protects the public against attempts by those monopolists to maximize their profits through restriction of their production by requiring production at a level higher than they would otherwise provide and at a price lower than that which they would otherwise offer. Enlightened regulation also attempts to avoid waste and guarantee a fair rate of return.

Transportation is an example of an industry in which regulation has expanded at a compound rate. Regulation of rail carriers began in the late nineteenth century. Regulation was expanded to embrace other modes of transportation by 1935, largely in order to ensure protection of regulated rail carriers and to maintain the delicate balance of modes competing for essentially the same traffic. The industry is an example of the tendency of regulation to proliferate.

Transportation is also an example of the initiation of regulation to prevent the deleterious effects of excessive competition. Thus, an additional reason for the promulgation of the Motor Carrier Act of 1935 was to protect existing motor carriers from the excesses of cutthroat competition which had caused numerous firms to drop out of the market during the economic turmoil of the Great Depression. The fear has been expressed that without regulation, the economies of scale inherent in the industry would cause concentration, and inevitably, oligopolistic and monopolistic markets.

9. 49 U.S.C. § 306(a)(1) (1976) ["public convenience and necessity" will also hereinafter be referred to as PC&N].

10. See *Trans-American Van Serv., Inc. v. United States*, 421 F. Supp. 308, 317 (N.D. Tex. 1976). For a discussion of the statutory evolution of the phrase "public convenience and necessity" and the intention of Congress in using the phrase in the Interstate Commerce Act, see *ICC v. Parker*, 326 U.S. 60 (1945).

11. 1 M.C.C. 190 (1936). This proceeding involved an application seeking authority to transport passengers between New York and Miami.

lic interest.”<sup>12</sup> However, *Pan-American* did not stand for the proposition that competition should be stifled. The decision acknowledged that “[p]ublic regulation can enforce what may be called reasonable standards of safe, continuous, and adequate service, but it can hardly be expected to take the initiative in experimentation and the development of new types of service . . . . Competition is the best-known spur to such endeavor.”<sup>13</sup>

Subsequent decisions condensed the *Pan-American* considerations into a single question: whether the advantages to those members of the shipping public who would employ the involved motor carrier service would outweigh the actual or potential disadvantages to existing carriers which might result from the institution of the proposed operations.<sup>14</sup> It was within this broad policy framework that the ICC evaluated applications for motor carrier operating authority.<sup>15</sup>

The first criterion of *Pan-American*—whether the proposed opera-

12. *Id.* at 203. This decision has undoubtedly been the most frequently cited piece of legal literature ever drafted by the ICC.

13. *Id.* at 208. In so holding, the Commission followed the precedent established by the United States Supreme Court in *Chesapeake & Ohio Ry. v. United States*, 283 U.S. 35 (1931), which acknowledged that competition may stimulate better service to the public, and that “reasonable competition may be in the public interest.” *Id.* at 43.

14. See *All Am. Bus Lines, Inc., Common Carrier Application*, 18 M.C.C. 755, 776-77 (1939). See generally *Chandler, Convenience and Necessity: Motor Carrier Licensing by the Interstate Commerce Commission*, 28 OHIO ST. L.J. 379 (1967); Hutchinson & Chandler, *Evidence in Motor Carrier Application Cases*, 11 VAND. L. REV. 1053 (1958).

15. A motor carrier application typically involves at least three parties: the applicant, the shipper, and the protestant. There may, however, be any number of applicants seeking the same operating authority, multiple shippers supporting such applications, and numerous protestants opposing its issuance. The applicant is a motor carrier which files an application seeking authority to transport general or specified commodities within a specific geographic territory or between specified points. The authority sought may or may not be limited to the utilization of particular routes. The application must ordinarily be supported by consignors or consignees of the involved commodities who can convincingly demonstrate a public need for the proposed operations. The protestant is usually an existing motor carrier who is already authorized to provide all or a substantial portion of the proposed service, and whose responsibility it is to adduce legal or factual reasons why the proposed authority should not be granted.

An existing carrier possessing operating rights in conflict with those sought in an application proceeding may protest the issuance of operating authority. The protestant might be a participant in the supporting shipper's traffic and might also be providing a reasonably adequate service. Even if the protestant has not participated in the traffic, it might have solicited that traffic and might have made a significant investment in equipment and terminal facilities in order to serve the involved territory.

Generally, protests are filed in order to protect this kind of pecuniary investment or to prohibit a loss of traffic to a new entrant. If the protesting carrier has not been permitted to participate in the shipper's traffic, it may seek to acquire such additional traffic to balance its inbound services, or to permit it to enjoy economic growth within the territory in which it is already licensed to operate. Ordinarily, protesting carriers must demonstrate their operating authority and their willingness and ability to provide the proposed service. Should an existing carrier fail to make such an evidentiary presentation, the application for motor carrier operating authority will usually be granted, provided the applicant has established a *prima facie* case.



tions would serve a useful purpose responsive to a public demand or need—could be established by evidence of either an existing contemporary need or a reasonably foreseeable future one.<sup>16</sup> Even in the absence of opposition, a carrier seeking operating authority was required to prove by substantial and competent evidence a public need for the proposed operations.<sup>17</sup> More specifically, in order to establish a *prima facie* case of a public need for the proposed operations, an applicant seeking motor carrier authority was obligated to comply with the requirement set forth in the ICC's decision in *John Novak Contract Carrier Application*:<sup>18</sup>

Those supporting the application should state with specificity the transportation service which they believe to be required.

The shippers and consignees supporting applications for authority to transport property should identify clearly the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic, and any deficiencies in existing services.

Those supporting an application for authority to transport passengers should indicate the frequency with which they would use the proposed service and should identify any transportation services now available and the inadequacies believed to exist in such services.<sup>19</sup>

Where a significant demographic increase in population requires additional transportation services to satisfy the reasonable demands of the public, the ICC has generally approved increased authority. The Commission has reasoned that its "function in proceedings such as this [is not] to preserve the *status quo* at all costs, denying improvements or augmentations in transportation service. The transportation industry

16. See, e.g., *L.P. Transp., Inc., Extension—Methane*, 126 M.C.C. 427, 431 (1977); *Freeport Transp., Inc., Extension—Insulation*, 121 M.C.C. 66, 70 (1975).

17. See, e.g., *Road Runner Trucking, Inc., Extension—Meat and Frozen Bakery Products*, 124 M.C.C. 245, 248 (1976); *Aero Trucking, Inc., Extension—Iron and Steel Articles*, 121 M.C.C. 742, 752 (1975); *Coastal Tank Lines, Inc., Extension—Two Way Bulk Traffic*, 119 M.C.C. 474, 483 (1974); *Hearin-Miller Transp., Inc., Extension—Eufaula, Ala.*, 110 M.C.C. 217, 220 (1969).

18. 103 M.C.C. 555 (1967). These criteria were not intended as procedural impediments, but were instead designed to insure that the ICC will have sufficient information to determine whether a public need exists. *Twin City Freight v. United States*, 360 F. Supp. 709, 712-13 (D. Minn. 1972).

19. 103 M.C.C. at 558 app. See note 15 *supra*. These requirements were extended to motor common carriers in *West Neb. Express, Inc., Extension—Five States*, 118 M.C.C. 423 (1973), and *Cloud Common Carrier Application*, 115 M.C.C. 77 (1972). The burden of proof applied in proceedings of regulatory bodies such as the ICC requires that the application be supported by "reliable, probative and substantial evidence." 5 U.S.C. §§ 551-559 (1976), *Manufacturers Express, Inc., Extension—Malt Beverages*, 126 M.C.C. 174, 177 (1977). See *East Tex. Motor Freight Lines Inc., Extension—Off-Route Point*, 125 M.C.C. 574, 579-80 (1976). The burden of proof is on the applicant. See 5 U.S.C. § 556(d) (1976).

should be dynamic, rather than static. . . ."<sup>20</sup> Similarly, a significant increase in the volume of a shipper's traffic has frequently served to justify the authorization of additional motor carrier service.<sup>21</sup>

Because a certificate to operate as a motor common carrier may be obtained upon a demonstration that the proposed operation will satisfy the present or *future* public convenience and necessity, a potential need as well as a present necessity for transportation services has been recognized as a valid basis for a grant of operating authority. A future need for a particular service may be established by evidence that the supporting shipper is actually soliciting business or has some definite plan from which it can reasonably be discerned that the commodities sought to be transported will move in the near future.<sup>22</sup> "The proof of such future need, while it must have some foundation, will in the nature of things be less definite and certain than proof of an existing need."<sup>23</sup> Although a shipper may assert that it requires a number of carriers to satisfy its future transportation needs, it has nevertheless been required to produce specific details regarding its potential transportation requirements.<sup>24</sup>

Under the traditional approach, the cumulative burdens of proof established by *Pan-American* and *Novak* fell most heavily upon applicants, while the corresponding burdens upon protestants remained relatively low. The tripartite test of *Pan-American* demanded consideration of the services and operations of existing carriers and the ultimate effect of a grant of operating authority upon the total quantity and quality of service provided to the shipping, receiving, and consuming public.<sup>25</sup> The inadequacy of existing services was frequently deemed to be a fundamental ingredient in the evaluation of what con-

20. Cassens Transp. Co. Extension—Three States, 67 M.C.C. 410, 413 (1956).

21. See Miller Petroleum Transp. Extension—Petroleum Prods., 81 M.C.C. 443, 445 (1959). See Kaylor & Stuart Extension—Copperhill, Tenn., 124 M.C.C. 441, 446 (1976); Daily Express Inc., Extension—Power Cranes, 124 M.C.C. 87, 95 (1975); Fleet Transp. Co. Extension—Rutherford County, Tenn., 112 M.C.C. 813, 818 (1971). However, it was well established that emergency transportation requirements of a shipper arising during extraordinary peak periods of business activity were an insufficient basis upon which to predicate a grant of permanent operating authority. See Johncox Extension—Frozen Merchandise, 121 M.C.C. 9, 13 (1975).

22. See George Transit Line, Inc., Extension—Des Moines, Iowa, 121 M.C.C. 626, 632 (1975); Hearin-Miller Transp., Inc., Extension—Point Comfort, Tex., 100 M.C.C. 50, 55 (1965); Miller Transp. Extension—Urea, 84 M.C.C. 684, 686-87 (1961); Gibbon Extension—Liquid Petroleum Wax, 67 M.C.C. 252, 253 (1956).

23. Morgan Drive-Away, Inc., Extension—Harnett County, N.C., 112 M.C.C. 392, 395 (1970). See C.P.T. Freight, Inc., Extension—Burns Harbor, Ind., 100 M.C.C. 136, 145 (1965).

24. See Peake Extension—Kan. & Neb., 68 M.C.C. 45, 48 (1956); George F. Burnett Co. Extension—North Brunswick, N.J., 64 M.C.C. 400, 402 (1955).

25. Motor Common Carriers of Property, Routes & Serv., 119 M.C.C. 170, 187 (1973).

stituted the public convenience and necessity.<sup>26</sup> To protect certificated common carriers providing adequate and dependable service, the applicant was frequently required to demonstrate affirmatively that the proposed transportation was such that available existing carriers either could not or would not perform it in a reasonably satisfactory manner.<sup>27</sup>

26. *See, e.g.*, *Southern Kan. Greyhound Lines, Inc. v. United States*, 134 F. Supp. 502, 510 (W.D. Mo. 1955); *Hudson Transit Lines, Inc. v. United States*, 82 F. Supp. 153, 157 (S.D.N.Y. 1948); *Inland Motor Freight v. United States*, 60 F. Supp. 520, 524 (E.D. Wash. 1945). The inadequacy of existing operations was also described as one of the basic elements in the determination of what constitutes the public need. *See C & H Transp. Co. v. ICC*, 589 F.2d 565, 572-73 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); *Chemical Leaman Tank Lines, Inc., Extension—Wyandotte*, 123 M.C.C. 873, 878 (1975). However, this factor was not deemed synonymous with the statutory concept of public convenience and necessity. *See Ace Freight Line, Inc., Extension—Canned Goods*, 124 M.C.C. 799, 802 (1976).

27. *See Zuzich Truck Line, Inc., Investigation & Revocation of Permit*, 83 M.C.C. 625, 637 (1960). The ICC repeatedly held that in the absence of a showing that available motor carrier services were inadequate in some significant respect, it would not be in the public interest to authorize the entry of a competitive newcomer into the field. *See, e.g.*, *Chandler Trailer Convoy, Inc., Extension—Otero County, Colo.*, 83 M.C.C. 577, 580 (1960). Existing carriers were generally deemed to be entitled to the protection afforded them under the Interstate Commerce Act against the injection of additional competition into an area which already possessed an abundance of adequate motor carrier service. To deprive existing motor carriers of the traffic they were authorized to transport by diluting the field with the addition of a new competitive service might prevent the existing carriers from operating at full capacity. Moreover, such deprivation might "result in idle equipment and employees, declining revenues, inactive terminals and inefficient operations." *Buanno Transp. Co. Extension—Gloversville, N.Y.*, 117 M.C.C. 700, 704 (1972). The grant of additional operating authority in such circumstances would be contrary to the public interest. The authorization would endanger existing carriers by instituting needlessly duplicative transportation services which had not been proven to be responsive to the public need. *See, e.g.*, *Landgrebe Transit, Inc., Extension—Valparaiso, Ind.*, 119 M.C.C. 96, 100 (1973); *Midwestern Express, Inc., Extension—Paper*, 117 M.C.C. 720, 723 (1973). Moreover, no corresponding benefit to shippers and receivers of the involved commodities would result. In numerous application proceedings, the ICC has refused to authorize a new, competitive service where the evidence has demonstrated that the new service would merely supplement services already provided by existing carriers and where existing services have not otherwise been shown to be materially deficient. *See, e.g.*, *A & A Produce Co. Extension—Bananas*, 92 M.C.C. 77, 80 (1963); *C & H Transp. Co. Extension—Silos*, 88 M.C.C. 285, 296-97 (1961).

The legislative history of the Motor Carrier Act of 1935 reveals that Congress recognized that situations might arise where competition between carriers would create harm as well as benefit. *McLean Trucking Co. v. United States*, 321 U.S. 67, 83-84 (1944). Where a carrier injures his competitor, the public might well ultimately bear the loss. *Id.* at 84. The protection of the public against the deleterious effects of destructive competition among carriers, including the deterioration in transportation services as a result of wasteful duplication was perceived to be a fundamental responsibility of the ICC. *See Motor Serv. on Interstate Highways—Passengers*, 110 M.C.C. 514, 534-35 (1969); *Auch Inter-Borough Transit Co. Extension—22 States*, 88 M.C.C. 455, 459 (1961). The National Transportation Policy, as stated in the Act of Sept. 18, 1940, ch. 722, § 1, 54 Stat. 899, requires the promotion of sound economic conditions in transportation and among the several carriers. *See also Motor Common Carriers of Property, Routes & Serv.*, 119 M.C.C. 530, 542 (1974).

Ordinarily, in the absence of a convincing demonstration of a need for additional services and proof of inadequacy in the transport services provided by existing carriers, the existence of a monopoly was not in itself a sufficient basis for the entry of a new carrier. *See Goeson Moving & Storage, Inc., Common Carrier Application*, 119 M.C.C. 676, 682 (1974); *Transport, Inc., Extension—Sioux Falls, S.D.*, 81 M.C.C. 751, 756 (1959). Moreover, a shipper's expressed preference

Even where an existing carrier had not notified the shipper of the existence of his service and solicited the involved traffic, the Commission nevertheless imposed an affirmative duty on shippers to inform themselves of the availability of existing operations before they sought additional motor carrier authorization.<sup>28</sup> The carrier was not required

for an applicant's service, standing alone, was an insufficient basis upon which to predicate a grant of operating authority. *See* Roadway Express, Inc., Extension—Grand Haven, Mich., 124 M.C.C. 80, 85 (1975); Eastern States Transp. Pa., Inc., Extension—Malt Beverages, 123 M.C.C. 725, 737 (1975).

28. With respect to the adequacy or inadequacy of existing transportation services, in the absence of a specific demonstration that such services had been utilized and that existing carriers were either unable or unwilling to satisfy the shipper's reasonable transportation requirements within the scope of their respective territories, existing carriers were deemed to be entitled to an opportunity to satisfy those requirements before the ICC would find a need for an additional competitive service. *See* Motor Serv. Co. Extension—Motor Homes, 123 M.C.C. 518, 522-23 (1975); Chemical Leaman Tank Lines, Inc., Extension—Wyandotte, 123 M.C.C. 873, 877-78 (1975); Ashworth Transfer, Inc., Extension—Colo. & N.M., 111 M.C.C. 56, 65 (1970); Peerless Stages, Inc., Investigation & Revocation of Certificate, 86 M.C.C. 109, 119 (1961), *aff'd per curiam*, 371 U.S. 22 (1962); Lester C. Newton Trucking Co. Extension—Wilmington, Del., 84 M.C.C. 157, 162 (1960). Stated differently, existing carriers were ordinarily entitled to handle all traffic which they could transport adequately, efficiently, and economically within the scope of their respective operating authorities before a new competitive operation would be authorized, Colonial Fast Freight Lines, Inc., Extension—Kosciusko, 121 M.C.C. 840, 846 (1975); Dealers Transit, Inc., Extension—Elec. Precipitators, 119 M.C.C. 429, 432 (1974); North Am. Van Lines, Inc., Extension—10 States, 119 M.C.C. 279, 284 (1973); Meeker Extension—Wichita Meats, 119 M.C.C. 158, 165 (1972); Mobile Home Express, Ltd., Extension—12 States, 112 M.C.C. 765, 771 (1971); Bowman Transp., Inc., Extension—Florida, 107 M.C.C. 876, 883 (1968); Peerless Stages, Inc., Investigation & Revocation of Certificate, 86 M.C.C. 109, 119 (1961), *aff'd per curiam*, 371 U.S. 22 (1962); Van Tassel, Inc., Extension—Feed & Feed Ingredients, 86 M.C.C. 185, 187 (1961); Homer D. Kirk Common Carrier Application, 24 M.C.C. 431, 432 (1940), at least where it could not be demonstrated that the existing carriers were unable or unwilling to satisfy the reasonable transportation requirements of the shipping public. Gregory Heavy Haulers, Inc., Extension—W. Va., 120 M.C.C. 14, 18 (1971). *But see* United States v. Dixie Highway Express, Inc., 389 U.S. 409 (1967), which held that while the ICC "should consider the public interest in maintaining the health and stability of existing carriers . . . the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service." *Id.* at 411 (quoting *ICC v. Parker*, 326 U.S. 60, 70 (1945)).

However, a finding that existing services were inadequate was not an indispensable prerequisite to a grant of authority. Suwannee Transfer, Inc.—Extension, 126 M.C.C. 366, 373 (1977); Acme Cartage Co. Extension—General Commodities, 120 M.C.C. 262, 269 (1974); Renner Motor Lines, Inc., Extension—Richmond, Ind., 117 M.C.C. 217, 221 (1972); Gateway Transp. Co. Extension—St. Mary's, Ga., 114 M.C.C. 484, 486-87 (1971). Carriers were not deemed to be entitled to absolute immunity against future competition. William H. Patterson, Jr. & Ralph Patterson Extension—York, Pa., 111 M.C.C. 645, 650 (1970). Even if it was not demonstrated that existing carriers were inadequate in any material respect, the Commission was not precluded from determining that other factors warranted the authorization of new and competitive operations. Johncox Extension—Frozen Merchandise, 121 M.C.C. 9, 12 (1975). This was so even where the initiation of the services would cause an existing carrier to suffer a pecuniary loss. *Id.* at 13; Suwannee Transfer, Inc.—Extension, 126 M.C.C. 366, 375 (1977); Tri-State Motor Transit Co., 125 M.C.C. 343, 350 (1976); Kaylor & Stuart Extension—Copperhill, Tenn., 124 M.C.C. 441, 446 (1976). For example, the Commission might conclude that under certain circumstances the need for more than a single carrier satisfies the public convenience and necessity even though no specific inadequacy in existing services has been demonstrated. *See* Petroleum Carrier Corp. v. United States, 258 F. Supp. 611 (M.D. Fla. 1966). However, it was repeatedly held that the mere preference of a shipper for a particular carrier was an insufficient basis upon which to predicate a

to ascertain each and every shipper having potential traffic.<sup>29</sup> Shippers were deemed to have some responsibility to arrange their distribution patterns so that they would be aligned with existing transportation services.<sup>30</sup> Otherwise, a shipper's expressed desire for a "complete" service provided by a single carrier might be deemed to constitute a "gimmick" for the acquisition of authority which would not actually improve the quality of service available to the public.<sup>31</sup> A shipper could not expect a utopian situation in which a single carrier would be capable of fulfilling its total transportation requirements.<sup>32</sup> However, it was recognized that despite the obligations of a shipper to align its distribution patterns with existing transportation operations, the particular nature of a shipper's operations and the involved commodities, as well as the specialized requirements of its customers, might require the institution of additional transportation services.<sup>33</sup>

An application which proposed nothing in the way of transportation services which were not already available over the lines of existing

grant of operating authority. *East Tex. Motor Freight Lines, Inc., Extension—Off-Route Point*, 125 M.C.C. 574, 581 (1976).

In *Nashua Motor Express, Inc. v. United States*, 230 F. Supp. 646 (D.N.H. 1964), the court declared:

[I]nadequacy of present service is not a term which is convertible with that of public convenience and necessity, but is, rather, only one element to be considered in arriving at the broader determination of public convenience and necessity. . . . Other elements of importance appear to be the desirability of competition, the desirability of different kinds of service, and the desirability of improved service.

*Id.* at 652. The court recognized that the inadequacy of existing service is not a term which is controlling in the determination of PC&N, but is one which should be considered along with other factors. *See Shippers Truck Serv., Inc., Extension—19 States*, 125 M.C.C. 323, 327 (1976); *Chickasaw Motor Line, Inc., Extension—Memphis, Tenn.*, 121 M.C.C. 476, 479 (1975). With respect to the relevance of increased competition, the United States Supreme Court stated in *Bowman Transp. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974): "A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating competitive market structure and performance is entitled to consideration." *Id.* at 298.

29. *Colonial Refrig. Transp., Inc., Extension—Confectionery*, 123 M.C.C. 255, 262 (1975); *P.C. White Truck Line, Inc., Extension—Atlanta, Ga.*, 120 M.C.C. 824, 847 (1974); *Heath Trucking, Inc., Extension—Meats*, 117 M.C.C. 768, 776 (1973); *Mobile Home Express, Ltd., Extension—12 States*, 112 M.C.C. 765, 771 (1971); *Warren Transp., Inc., Common Carrier Application*, 69 M.C.C. 241, 246 (1956).

30. *Schneider Transp., Inc., Extension—Garland, Tex.*, 119 M.C.C. 749, 752 (1974); *West Neb. Express, Inc., Extension—Five States*, 118 M.C.C. 423, 429 (1973); *Gra-Bell Truck Line, Inc., Extension—Coloma*, 115 M.C.C. 872, 880 (1972).

31. *Bilyeu Refrig. Transp. Corp. Extension—Mo. Origins*, 106 M.C.C. 692, 694 (1968). *See Superior Trucking Co. Extension—Agric. Mach.*, 126 M.C.C. 292, 299 (1977); *Johncox Extension—Frozen Merchandise*, 121 M.C.C. 9, 13 (1975); *North Am. Van Lines, Inc., Extension—10 States*, 119 M.C.C. 279, 283 (1973).

32. *McAdams, Inc., Extension—Twelve Southern States*, 119 M.C.C. 885, 889 (1974).

33. *See Watkins Motor Lines, Inc., Extension—Candy*, 124 M.C.C. 261, 269 (1976).

carriers would ordinarily be denied.<sup>34</sup> However, where a carrier proposed a unique type of transportation service not then available from existing carriers, the ICC frequently concluded that the public should not be deprived of the benefits accruing from the new and different service merely because it might divert traffic from existing carriers.<sup>35</sup> The services of existing carriers were not believed to be entitled to protection where this shielding from competition might deprive the public of a desirable and improved transportation service.<sup>36</sup>

Finally, the ICC generally held that between competing carriers of the same mode, the level of rates was not a matter which could be considered in determining whether a proposed service was in the public interest, unless the existing rates were so unreasonably high as to constitute, in effect, an embargo.<sup>37</sup> However, the inherent advantages of one mode of transportation over another is a factor which the ICC is required to consider in evaluating whether operating authority should be issued.<sup>38</sup>

Thus, the traditional approach has been a conservative one. The Commission heavily loaded the scales in favor of protestants by regularly suggesting, despite reprimands from the judiciary, that among the evidentiary obligations imposed upon applicants was a demonstration that the services of existing carriers, including protestants, were inadequate in some material respect. The protection of existing carriers from the deleterious effects of excessive competition seemed to become the policy focus of the agency.<sup>39</sup>

34. See *Baer Extension*—27 States, 119 M.C.C. 265, 272-73 (1973); *Warthen Extension*—Cranberries, 117 M.C.C. 470, 477-78 (1972); *Walter C. Benson Co. Extension*—N.Y., N.J. & Pa., 61 M.C.C. 128, 130 (1952).

35. *Ken L. Pollock Common Carrier Application*—Passengers, 119 M.C.C. 763, 771 (1974).

36. *Kroblin Refrig. Xpress, Inc., Extension*—Morrow, 125 M.C.C. 354, 359 (1976). The injury which existing carriers might incur as the result of the authorization of an additional competing carrier, in certain circumstances, was outweighed by the benefits accruing to the shipping public from the acquisition of the required service of an additional carrier. See *Superior Trucking Co. Extension*—Agricult. Mach., 126 M.C.C. 292, 299 (1977); *Johncox Extension*—Frozen Merchandise, 121 M.C.C. 9, 13 (1975).

37. *Roadway Express, Inc., Extension*—Eastern Md. Counties, 120 M.C.C. 578, 584 (1974); *Southland Produce Co. Contract Carrier Application*, 81 M.C.C. 625, 628 (1959).

38. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 89-90 (1957); *Karl Arthur Weber Extension*—California, 119 M.C.C. 67, 72-73 (1973). One can only speculate as to the economic injury suffered by rail carriers as a result of the U.S. Supreme Court's decision in *Schaffer*, for shortly thereafter, rail carriers found it futile to participate as protestants in motor carrier operating authority application proceedings.

39. See *Freeman & Gerson, Motor Carrier Operating Rights Proceedings—How Do I Lose Thee?*, 11 TRANSP. L.J. 13, 17-18 (1979) [hereinafter cited as *Freeman & Gerson*].

### III. THE ICC'S LIBERALIZATION OF ENTRY STANDARDS (1977-1980)

It was President Gerald Ford who first began to press for significant legislative reform of the traditional regulatory environment. Failing to obtain congressional approval of his legislative initiatives, he began to appoint individuals to the Commission who were firmly dedicated to regulatory reform. This effort was expanded and intensified under the Carter administration. Indeed, in retrospect, many of President Ford's appointees appear to be moderates when compared with those subsequently appointed by President Carter.

Curiously enough, it was a misinterpretation of a 1974 United States Supreme Court decision which gave the new Commission the requisite springboard from which to launch a reversal of the ICC's traditional approach, described in the preceding section of this article.

In *Bowman Transportation v. Arkansas-Best Freight System, Inc.*,<sup>40</sup> the Supreme Court concluded that it was well within the Commission's lawful realm of discretion to find "that the benefits of competitive service to consumers might outweigh the discomforts existing certificated carriers could feel as a result of new entry."<sup>41</sup> Nothing in the Supreme Court's opinion suggests that the ICC *must* evaluate the benefits of enhanced competition in determining whether proposed operations are consistent with the PC&N. The Court merely held that on the basis of the facts before it, "The Commission's conclusion that consumer benefits outweighed any adverse impact upon the existing carriers reflects the kind of judgment that is entrusted to it, a power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'"<sup>42</sup>

It was the District of Columbia Circuit, in the 1977 decision of *P.C. White Truck Line, Inc. v. ICC*<sup>43</sup> (a per curiam opinion that relied

40. 419 U.S. 281 (1974).

41. *Id.* at 298.

42. *Id.* at 293 (citing *United States v. Pierce Auto Lines*, 327 U.S. 515, 535-36 (1946)). Further, the Court held that "[t]he Commission, of course, is entitled to conclude that preservation of a competitive structure in a given case is overridden by other interests." *Id.* at 298 (citing *United States v. Drum*, 368 U.S. 370, 374-75 (1962)). See *Trans-American Van Serv., Inc. v. United States*, 421 F. Supp. 308, 322 (N.D. Tex. 1976). However, during the mid-1970s, the Commission began gradually to impose enhanced burdens upon protestants. For example, in *Sam Tanksley Trucking, Inc., Extension—Holland Heating and Air Conditioning*, 129 M.C.C. 470 (1977), the Commission acknowledged that "a diversion of potential traffic which existing carriers can move can impair or endanger their operations contrary to the public interest." *Id.* at 473. The Commission nevertheless noted that the protestant had failed to adduce evidence as to whether (1) it had "laid-off" employees, (2) deadheading might be eliminated if the protestant received the shipper's traffic, (3) it had substantial idle equipment or inefficient terminal operations, or (4) it suffered from an unsatisfactory financial condition. *Id.*

43. 551 F.2d 1326 (D.C. Cir. 1977) (per curiam).

heavily on *Bowman*), which established the notion that Commission consideration of the benefits of competition was an indispensable prerequisite to the Commission's evaluation of the PC&N. As many federal courts had previously done, the District of Columbia Circuit reprimanded the ICC for giving excessive weight to the issue of inadequacy of existing service.<sup>44</sup> But the court then went far beyond the principles previously established by other courts, emphasizing that:

The Commission ignored almost entirely the possible benefit to the public from increased competition which a grant of the application likely will foster.

. . . . .  
. . . Because the Commission failed to exercise its "power to weigh the competing interests," the orders under review must be reversed and the case remanded to the Commission for consideration of the contribution that increased competition might make to the public weal.<sup>45</sup>

On remand, the ICC maintained that it was compelled to consider the benefits of competition arising from a grant of operating authority in arriving at an appropriate balance of competitive interests.<sup>46</sup> The Commission took the court's mandate one step further, however, by imposing additional burdens upon protestants seeking to have an application for operating authority denied.

On the basis of the facts before the Commission, it was clear that the protestants would lose revenue as the result of the inauguration of new operations, and would thereby suffer injury because of the increased competition.<sup>47</sup> However, the ICC held that a pecuniary loss would not be sufficient to warrant a denial of operating authority where the protestant had failed to demonstrate that such a loss would be so significant as to jeopardize its operations in a manner contrary to the public interest.<sup>48</sup> The Commission insisted that protestants must demonstrate a nexus between their potential loss of revenue and adverse effects upon their operations, at least where such loss of revenue

44. See, e.g., *Trans-American Van Serv., Inc. v. United States*, 421 F. Supp. 308, 324-26 (N.D. Tex. 1976); *Nashua Motor Express, Inc. v. United States*, 230 F. Supp. 646, 653 (D.N.H. 1964).

45. 551 F.2d at 1328-29. This holding extends well beyond any decision which preceded it and has been criticized as follows: "In its haste to require that competition be considered, the Court overlooked or ignored the *Arkansas-Best Freight* conclusion that the Commission 'could consider' the benefits of competition when balancing appropriate factors pursuant to *Pan-American*, and exaggerated the Supreme Court's conclusion concerning the relevancy of competitive considerations." Freeman & Gerson, *supra* note 39, at 20 (footnotes omitted).

46. *P.C. White Truck Line, Inc., Extension—Atlanta, Ga.*, 129 M.C.C. 1, 6 (1978).

47. *Id.* at 8.

48. *Id.*



does not constitute a substantial portion of their aggregate income.<sup>49</sup>

The significance of this decision lies in the fact that it constitutes the first major step ever taken to place significant evidentiary burdens upon protestants. Prior to *P.C. White*, in the *Pan-American* and *Novak* line of cases, the focus had been on the evidentiary obligations of the applicant. Nevertheless, aside from imposing consideration of the benefits of new competition as a condition precedent to a denial of operating authority,<sup>50</sup> the decision in *P.C. White* was reasonably moderate. It did not alter the fundamental obligations of either *Pan-American* or *Novak*. The decision also indicated that a substantial loss of revenue by protestants resulting from the issuance of new operating authority might well warrant a denial of that authority.

In *Liberty Trucking Co. Extension—General Commodities*,<sup>51</sup> the Commission took the crusade for increased competition two steps further. It defined the competitive interests which must be balanced as the benefits which might be realized by the shipping and consuming public as a result of new competition and the "destructive impact a new service might have on existing carriers."<sup>52</sup> But the Commission then went on to insist that the protestant "establish an interest worthy of regulatory protection from competition"<sup>53</sup> and to suggest that even where the inauguration of new service would materially jeopardize existing carriers' ability to serve the public (and, conceivably, throw the protestant into bankruptcy),<sup>54</sup> such injury might be outweighed by the benefits of new competition.<sup>55</sup> *Liberty* expanded the obligations created in *P.C.*

49. The Commission held that

protestants should normally be obligated to introduce more than merely evidence of the revenues they may lose to the applicant, unless it is patently clear that the revenues amount to a significant percentage of the carriers' overall income. The protestants should indicate specifically how the potential loss of revenue resulting from applicant's competition will adversely affect their operations.

*Id.* at 9. In an excellent review of these decisions, Professor Freeman and Mr. Gerson have summarized the holding as follows:

The meaning of *P.C. White II* is clear. Increased competition is presumed to be in the public interest, and protestants seeking to overcome this policy favoring increased competition must now assume a greater evidentiary burden and be much more specific in pinpointing the injury that will befall them (and, more importantly, the shipping public) if the application is approved. A mere allegation of possible revenue loss will not satisfy this burden; protestants must show, at a minimum that their operations would be jeopardized, as would their corresponding ability to serve the public.

Freeman & Gerson, *supra* note 39, at 22.

50. It could be argued that the decision in *P.C. White* established consideration of the benefits of new competition as an essential component of the PC&N as well.

51. 130 M.C.C. 243 (1978), 131 M.C.C. 573 (1979).

52. 130 M.C.C. at 246.

53. *Id.*

54. See Freeman & Gerson, *supra* note 39, at 23.

55. 130 M.C.C. at 246.

*White* by insisting that in order to establish an interest worthy of regulatory protection, protestants must prove (a) that authorization of a competitive service will lead to substantial traffic diversion and material revenue loss, (b) that loss of traffic and revenue will affect their ability to serve the public, and (c) that such injury is not outweighed by the benefits to be derived as a result of heightened competition. The ICC indicated that with respect to the potential for injury of existing carriers as a result of new entry, it would "not deny the public the benefits of an improved service or heightened competition merely to protect the inefficient or to insulate existing carriers from more vigorous competition."<sup>56</sup>

Just as prior Commissions had loaded the scales heavily in favor of protestants in order to shield them from the deleterious effects of excessive competition, the Commission of the late 1970's began to load the scales heavily in favor of applicants in order to allow them and the public to enjoy the fruits of new competition. The presumption that enhanced competition was clearly in the public interest became so significant that it was likely that protestants would only rarely be able to shoulder the onerous evidentiary burdens placed upon them.<sup>57</sup> By 1979, as a result of this liberalized approach to entry, the ICC was granting ninety-eight percent of the motor carrier operating authority applications filed.<sup>58</sup>

Expanding its new devotion to the attributes of enhanced competition beyond *Liberty*, the Commission in 1979 also developed a policy that encouraged applicants to submit evidence that they would offer lower rates to shippers should the application be granted.<sup>59</sup> This, of

56. 131 M.C.C. at 576. The ICC further stated, "[C]ompetition is generally presumed to be in the public interest, not contrary to it. . . . Harm to a particular carrier becomes relevant only if there is a corresponding impact upon the public interest." *Id.* See also *May Trucking Co. v. United States*, 593 F.2d 1349, 1356 (D.C. Cir. 1979).

57. One decision in which protestants satisfied this burden was *Colonial Refrig. Transp., Inc., Extension—Florida to 32 States*, 131 M.C.C. 63 (1978). In *Colonial*, the applicant sought operating authority to transport frozen foods from points in Florida to a significant portion of the United States. In finding that the protestants had satisfied their burden, the Commission concluded that the issuance of the proposed authority "could result in unhealthy competition which could impair operations of existing carriers contrary to the public interest." *Id.* at 69.

However, most carriers which serve Florida have an imbalance in their operations, for the state's economy is based heavily on tourism; Florida is a net consumer of manufactured goods and exports little to the rest of the nation. The traffic imbalances and fuel inefficiencies inherent in such circumstances make Florida a unique market from a transportation perspective, one which might well prompt a transportation regulatory agency to evaluate carefully the possible deleterious effects of new entry. Further, the high level of competition which already exists for such traffic may make additional benefits from increased competition less likely.

58. See *Freeman & Gerson*, *supra* note 39, at 15 n.3.

59. Change of Policy Consideration of Rates in Operating Rights Application Proceedings,

course, reversed a long line of cases which had prohibited consideration of the issue of rates except where an embargo existed<sup>60</sup> or where the issue was relevant to the determination of the inherent advantages of alternative modes of transportation.<sup>61</sup>

In Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation*,<sup>62</sup> issued that same year, the ICC acknowledged that it had increased its emphasis on the need for new competition while correspondingly decreasing its emphasis on the protection of existing carriers.<sup>63</sup>

Today, we take a step further. We adopt a policy statement to the effect that an opposing carrier must bear the evidentiary burden of showing that a grant of authority will adversely affect its operations to the detriment of the public interest, and we expressly eliminate as a factor in making our decision the second *Pan-American* criterion.<sup>64</sup>

Thus, *Pan-American* was effectively modified into a two step test in which the applicant was required to prove that the proposed operation would "serve a useful public purpose responsive to a public demand or need," and if the applicant sustained this burden of proof, the burden then shifted to protestants to demonstrate that the entry of a new carrier "would endanger or impair the operations of existing carriers to an extent contrary to the public interest."<sup>65</sup>

By late 1979, the ICC was poised to go further still, announcing in Ex Parte No. MC-135, *Master Certificates and Permits*,<sup>66</sup> that it was contemplating a rulemaking finding of general consistency with the public convenience and necessity in the transportation of heavy haulers, temperature controlled service, lumber and building materials, metal, bulk material, household goods, film, vehicles, and armored car and wrecker services.<sup>67</sup> This would have, in effect, constituted *de facto*

359 I.C.C. 613 (1979). Regarding the hoped for results of this change in policy, the Commission stated:

We hope that this change in policy will stimulate innovative pricing and service options, promote efficient and well-managed operations, and encourage rate competition. Furthermore, by allowing carriers who can operate efficiently to enter the market, we believe that increased efficiency and productivity by all carriers will be encouraged which will help control the cost of transportation and inflation.

*Id.* at 616.

60. See note 37 and accompanying text *supra*.

61. See *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 91-92 (1957).

62. 44 Fed. Reg. 60,296 (1979) [hereinafter cited as Ex Parte No. MC-121].

63. *Id.* at 60,298.

64. *Id.* at 60,299.

65. *Id.*

66. Decided June 27, 1980 (not published).

67. See Dempsey, *Erosion of the Regulatory Process in Transportation—The Winds of Change*, 47 ICC PRAC. J. 303, 317-18 (1980) [hereinafter cited as *Erosion of the Regulatory Process*].

deregulation of those segments of the industry.

Congress became concerned with this apparent trend toward unending reliance upon the purported benefits of competition and informally, but strongly, insisted that the Commission go no further toward deregulation until it had received specific guidance from Congress in the form of legislative amendments to the Interstate Commerce Act.<sup>68</sup> Accordingly, the "Master Certificate" rulemaking and parallel efforts were halted pending action by Congress.

Nevertheless, in *Arrow Transportation Co. Extension—Boise, Idaho*,<sup>69</sup> the Commission indicated that the protestant's burden extended not only to proving that the issuance of new operating authority would jeopardize that portion of the protestant's operations directly competitive with the new operations, but that such a new entry would also have a deleterious effect upon the protestant's overall operations. On the facts before it in *Arrow*, the Commission acknowledged that as a result of the issuance of the authority the protestant would lose as much as "50 percent of its traffic from Boise" which would "have devastating effects on the operation of its Boise terminal, as it would be required to reduce its terminal staff to three."<sup>70</sup> However, because the protestant had only addressed losses in the affected territory and had failed to demonstrate either how these losses would affect its overall operations or how such losses would cause corresponding injury to the public, the Commission granted the application.<sup>71</sup>

Following the precedent it had established in *P.C. White*, the District of Columbia Circuit, in *May Trucking Co. v. United States*,<sup>72</sup>

68. Congressman Elliott Levitas, although a supporter of the Motor Carrier Act of 1980, noted with chagrin:

In the last few years, the Interstate Commerce Commission has undertaken by rule to change the Interstate Commerce Act without following any kind of Congressional mandate, and in some instances directly in face of the Congressional mandate. Letters have been written by the Chairmen of the Senate Commerce, Science and Transportation and House Public Works and Transportation Committees stating that the ICC is going beyond its statutory authority. In addition, the Congress, in passing the Department of Transportation's 1980 appropriation, stated its intent that the ICC was not to continue its process of deregulating the motor carrier industry prior to the completion of the work of the Congress on the pending legislation related to that question.

In spite of these actions, which constitute a major portion of the Congress oversight powers, the Interstate Commerce Commission has ignored these actions and gone on its own merry arrogant way.

HOUSE REPORT, *supra* note 5, at 97.

69. 131 M.C.C. 941 (1980).

70. *Id.* at 942.

71. *Id.* at 942-43. However, the Ninth Circuit Court of Appeals recently ordered the Commission to vacate its decision in *Arrow*. *Pacific Intermountain Express Co. v. United States*, No. 80-7251 (9th Cir. Nov. 2, 1981). Hence, *Arrow* may not be cited by the Commission as precedent in future cases regarding the burden of proof imposed on protestants.

72. 593 F.2d 1349 (D.C. Cir. 1979).

seemed to affirm the Commission's increased focus on the attributes of competition and the imposition of heavier burdens on protestants when it stated:

Competition frequently entails a loss of customers, but ordinarily it is in the public interest, not contrary to it. It was incumbent upon [the protestant] to show not merely that [the applicant] would compete with other carriers and might succeed in luring some of their customers away, but that [the applicant's] operations would likely promote inefficiency and waste or destroy [the protestant's] ability to compete.

Injury to existing carriers through competition becomes relevant only when there is corresponding injury to the public. Congress designed the Interstate Commerce Act to benefit the people, not to create protected monopolies for those who profess to serve the public.<sup>73</sup>

The *P.C. White* line of reasoning has to some extent also been adopted by the Seventh Circuit, which concluded in *Sawyer Transport, Inc. v. United States*,<sup>74</sup> "that the adequacy of existing service is only one element to be considered, and that the ICC must consider whether additional competition would serve the public convenience and necessity."<sup>75</sup>

However, the Fifth and Sixth Circuits have had less enthusiasm for the Commission's liberalized approach to entry. In *Argo-Collier Truck Lines Corp. v. United States*,<sup>76</sup> the Sixth Circuit reversed a decision of the ICC which granted a certificate of PC&N authorizing the transportation of foodstuffs from Illinois to points in several southeastern states. The court disagreed with the ICC's determination that protestants would not suffer material adverse effects as a result of the issuance of the proposed authority, noting that among the carriers affected by the ICC's decision, one protestant might be forced to close a terminal in which it had made substantial outlays while another had already experienced serious losses.<sup>77</sup> The court was particularly critical of the Commission's approach:

73. *Id.* at 1356 (footnotes omitted). "Injury to the public" apparently does not include pecuniary injury to those holding financial interests in trucking companies or those employed by such companies. Under the *May* court's reasoning, such individuals are effectively not members of the public.

74. 565 F.2d 474 (7th Cir. 1977).

75. *Id.* at 478. However, the extent to which the Seventh Circuit adopted the pro-competition philosophy may be limited to the facts presented in *Sawyer*, for the court emphatically stated, "The possible public benefit from increased competition cannot be ignored in circumstances such as we have before us in which denial of an application, in essence, grants a monopoly to the existing contract carrier." *Id.* Further affirming this limitation of *Sawyer's* precedential value, the court also stated, "In a case such as the instant case, we adopt the reasoning and position of [the D.C. Circuit] as expressed in *P.C. White* . . . ." *Id.*

76. 611 F.2d 149 (6th Cir. 1979).

77. *Id.* at 155.

In instances admitting of any doubt, the ICC resolved them in favor of the applicant, contrary to the burden of proof then upon [the applicant]. With the basis for its conclusions not clearly articulated, the reviewing court must be left with the suspicion that the decision was made for a reason not stated in the record: solely for the purpose of increasing competition in the area in disregard of the other policies articulated by Congress.<sup>78</sup>

As these decisions strongly suggest, the court's suspicion was an accurate one, for the ICC seemed poised to grant operating authority as broadly and freely as possible.

The Sixth Circuit went on to describe the proper weight to be accorded the element of competition:

The ICC is required to balance the public interest in promoting competition with the need to maintain sound economic conditions in the industry through the entry of newcomers . . . . It is evident that competition may create waste injurious to an existing carrier's ability to compete, with resulting injury to the public, through inefficient service, and unnecessary and wasteful expenditures. Neither the promotion of competition nor the avoidance of unsound practices is to be the paramount policy. Both are to be balanced with other relevant factors and a decision made by the ICC on the basis of the facts in the record.<sup>79</sup>

This decision seems implicitly to reject the *P.C. White* line of precedent, for it suggests that competition is but one element to be considered by the ICC in determining consistency with the PC&N, perhaps not even the dominant element, and that an ICC decision which fails specifically to address the attributes of increased competition may not necessarily be deficient.

Finally, while greatly increasing protestants' burden of proof, the ICC had proceeded concurrently to reduce applicants' burden. In tandem, these changes made it virtually impossible for a protestant to prevail. However, in *Refrigerated Transport Co. v. ICC*,<sup>80</sup> the Fifth Circuit concluded that the Commission had gone too far in easing the applicant's burden, and rejected the ICC's effort to grant statewide operating authority where the evidence demonstrated a public need for service only at a single point.<sup>81</sup>

78. *Id.*

79. *Id.* (citations omitted).

80. 616 F.2d 748 (5th Cir. 1980).

81. *Id.* at 753-54. The court further stated:

When an applicant for a certificate of public convenience and necessity seeks authority to provide transportation to many localities in a large geographical area, it is not necessary that he demonstrate a public convenience and necessity with respect to each point for which he seeks authority. "[T]here is no requirement that data on need and benefit be gathered for every village and hamlet in the area of proposed operations before a certificate of such encompassing scope may be awarded." What an applicant

#### IV. THE CONGRESSIONAL RECODIFICATION OF ENTRY STANDARDS: THE MOTOR CARRIER ACT OF 1980

##### A. A Review of the Legislation

Prior to the enactment of the Motor Carrier Act of 1980, the Interstate Commerce Act required that an applicant seeking motor common carrier authority demonstrate (a) that it was fit, willing and able to provide the proposed service and to conform to the provisions of the Act and the Commission's rules and regulations promulgated thereunder, and (b) that the proposed operation "[was] or [would] be required by the present or future public convenience and necessity."<sup>82</sup> These requirements have been retained in section 10922 of the 1980 Act for motor carriers of *passengers*.<sup>83</sup> However, for motor carriers of *property*, while retaining the fitness requirement set forth above, the 1980 Act requires only that the applicant prove that the proposed operations "will serve a useful public purpose, responsive to a public demand or need,"<sup>84</sup> in effect codifying the first *Pan-American* criterion.<sup>85</sup> Further, the Motor Carrier Act of 1980 imposes a novel statutory burden upon protestants. It is no longer the applicant's burden to prove that the proposed operations are consistent with the PC&N; the burden has now been shifted to protestants to demonstrate that such operations are "in-

seeking broad authority must do, however, is to demonstrate "need at numerous representative points." An applicant's "showing of need at numerous representative points raises a rebuttable presumption of a requirement for extended service at those points for which testimony is not available." The Commission may infer from an unrebutted representative showing that the need for service extends beyond the precise localities for which evidence is given.

We expressed the view in *Miller Transporters, Inc.*, that there is no precise formula for making a sufficient showing of need to justify a broad grant of authority. There we said "we decline to play a numbers game designed to devise a precise formula as to whether evidence of the need for service at 10 points is enough to justify service at 20 or 30 more." We note that in reviewing the scope of authority granted on the basis of evidence relating to only some of the localities, "the basic question . . . is . . . whether an inference of similarity throughout the area embraced by . . . [applicant's] certificate could rationally be drawn from the evidence presented." While we once again decline to play a numbers game, we think that the Commission could not rationally infer from the evidence before it that a statewide grant of operating authority was needed. In the case before us, Belford's application is supported by the statement of a single shipper. That shipper provides evidence with respect to a need between Jacksonville and a single other point within the state of Florida. The applicant has made no showing that the supporting shipper's testimony with respect to the need between those two points is representative of a greater need and there is simply no evidence from which the Commission could infer the existence of a greater need.

*Id.* at 754 (citations omitted).

82. 49 U.S.C. § 307(a) (1976).

83. 49 U.S.C.A. § 10922(a) (West Supp. 1981).

84. *Id.* § 10922(b)(1)(B).

85. See notes 12-13 and accompanying text *supra*.

consistent with the public convenience and necessity.”<sup>86</sup> Protestants are not left totally out in the cold, however, for the Commission is directed to make findings in entry proceedings of “the effect of issuance of the certificate on existing carriers.”<sup>87</sup> But the statute proceeds to direct the ICC not to conclude that the burden on protestants has been satisfied solely by proof of diversion of traffic or loss of revenue resulting from new entry.<sup>88</sup> This suggests some measure of congressional approval of those portions of the *P.C. White* and *Liberty* opinions which suggest that protestants must prove something more than economic injury in order to persuade the Commission to deny an application.<sup>89</sup> Additionally, existing common carriers may not submit a protest unless they hold at least a portion of the proposed authority, are willing and able to provide the proposed service, and (a) have provided service within the scope of the application within the preceding 12 months (or have actively solicited such traffic), (b) have pending before the ICC a previously filed application in which they are seeking operating authority substantially duplicative of the authority sought, or (c) are granted leave to intervene by the ICC.<sup>90</sup>

The other major provision in the Act is section 10101, the congressional expression of the National Transportation Policy.<sup>91</sup> This policy statement guides all of the Commission’s regulatory activities, but Congress felt it necessary to emphasize the importance of this policy in entry proceedings by expressly requiring that the ICC make findings in such proceedings with respect to the policy.<sup>92</sup> The 1980 legislation also adds a new subsection addressing motor carriers of property, for which the ICC must now

promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E)

86. 49 U.S.C.A. § 10922(b)(1) (West Supp. 1981).

87. *Id.* § 10922(b)(2)(B).

88. *Id.* The ICC is further directed to adhere to the congressional statement of the National Transportation Policy set forth in § 10101 of the Act. *Id.* § 10922(b)(2)(A).

89. See notes 43-56 and accompanying text *supra*.

90. 49 U.S.C.A. § 10922(b)(7) (West Supp. 1981). Contract carriers are prohibited from opposing motor common carrier applications. *Id.* § 10922(b)(8). However, opposition by common carriers of contract carrier applications, although restricted, is not prohibited. See *id.* § 10923(b)(4).

91. *Id.* § 10101.

92. *Id.* § 10922(b)(2)(A).



provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.<sup>93</sup>

The inherent problem with this kind of vegetable soup approach is that it seeks to offer something for everyone. Proponents of unlimited entry (many of whom have been selected to serve on the Commission in recent years) can argue that new entry encourages competitive and efficient service by satisfying the needs of the public, permitting the public to enjoy a wide variety of price and service options, and allowing productive use of equipment and energy resources. Opponents of unlimited entry can argue with equal force that these virtuous objectives cannot be attained without a cautious approach to entry in each market on a case-by-case basis, with a careful weighing of the impact of new entry upon the ability of existing carriers to serve the public.

Two overriding conclusions can be drawn from the provisions of the 1980 Act. First, by reversing the burden of proof on the PC&N issue, Congress clearly intended to make entry more liberal than it had been during the protectionist era (1935-1977) under the prior statute. Second, by retaining the concept of PC&N, Congress clearly did not intend that entry be unlimited. Indeed, although it expanded the list of motor carrier activities which would be exempt from the PC&N requirement,<sup>94</sup> Congress expressly prohibited the ICC from making across the board findings of general consistency with the PC&N, so as to accomplish wholesale deregulation of specific sectors of the industry under the "Master Certificate" approach.<sup>95</sup> Congress surely would not have retained case-by-case adjudication of licensing proceedings, forcing carriers to expend time and money on those proceedings, had it intended such proceedings to constitute a mere sham in which the Commission rubberstamped grants of operating authority in a mindless charade of unlimited entry.

### *B. An Analysis of the Legislative History*

The two principal sources of legislative history for the Motor Car-

93. *Id.* § 10101(a)(7). See generally Harper, *Entry Control and the Federal Motor Carrier Act of 1980*, 12 TRANSP. L.J. 51 (1981).

94. See notes 116-117 *infra*.

95. The "Master Certificate" approach involved a general finding by the ICC in rulemaking that a wide range of applications in a particular area would be consistent with the public interest, without the requirement for case-by-case adjudication of the issue. See HOUSE REPORT, *supra* note 5, at 6; notes 66-68 and accompanying text *supra*.

rier Act of 1980 are the House report<sup>96</sup> and the Senate report.<sup>97</sup> There is no Conference report because, as a result of a deal struck during the last summer of the Carter presidency, the White House agreed with congressional leaders to abandon the more liberal Senate bill in favor of the somewhat more conservative House measure. Hence, the House report is the more authoritative of the two, for it addresses the specific provisions ultimately enacted into law.<sup>98</sup>

In the House report, Congress expressed strong disapproval of the traditional protectionist regulatory philosophy,<sup>99</sup> criticizing it as having tended to inhibit innovation, and having failed "to sufficiently encourage operating efficiencies and competition."<sup>100</sup> Congress felt that increased "competition will bring about the most efficient and economical delivery of transportation services to the public."<sup>101</sup> However, while the original bills stressed competition as the principal means of

96. HOUSE REPORT, *supra* note 5.

97. SENATE REPORT, *supra* note 4.

98. As Representative Harsha noted:

The Committee has been advised that if the House passes H.R. 6418, free of substantive change, the Senate will pass it, and President Carter will sign the bill into law. Importantly, there will be no need for a conference. In this regard, the House committee report will essentially serve as a "conference report" since the report was reviewed by the Senate prior to its being filed and, indeed, was changed in a number of important respects at the request of the Senate.

126 CONG. REC. H5345 (daily ed. June 19, 1980).

Because statements made in Congress during debates or hearings on proposed legislation are often simply self serving declarations by opponents or proponents of the matter under consideration and may not be accepted by those who vote on a measure, courts often accord less weight to such statements than to other legislative materials. *See, e.g.,* Humpfrey's Executor v. United States, 295 U.S. 602 (1935); SEC v. Robert Collier & Co., 76 F.2d 939 (2d Cir. 1935); H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES, 363-66 (1976). A prime example of why such statements are less reliable sources of legislative history is a colloquy between Senators Cannon and Packwood, 126 CONG. REC. S7684-85 (daily ed. June 20, 1980), which has been heavily relied upon by the ICC in support of its new entry policies. *See, e.g.,* Art Pape Transfer, Inc., Extension—Commodities in End-Dump Vehicles, 132 M.C.C. 84, 94 (1980). Senator Birch Bayh subsequently pointed out that this influential "colloquy" never actually occurred, but instead was fabricated and inserted into the record as support for a liberal interpretation of the new legislation. *See* 126 CONG. REC. S9064-66 (daily ed. July 1, 1980) (statement of Sen. Bayh). No other member of Congress had an opportunity to hear or comment upon the Cannon-Packwood interpretation of the Act during actual debate. Given this weakness of debates and hearing testimony as reliable legislative history, the focus in this article will be on the House and Senate reports.

99. HOUSE REPORT, *supra* note 5, at 14. The traditional regulatory policy is described in the text accompanying notes 7-39 *supra*.

100. HOUSE REPORT, *supra* note 5, at 10. *See* SENATE REPORT, *supra* note 4, at 6. The Senate noted that the traditional standards had "been directed chiefly toward protecting existing carriers from new and unwanted competition. Historically, in most cases, if existing certificated carriers either performed or offered services similar to that being applied for by a new carrier, the applicant would not be permitted to enter and do business." *Id.* at 5. Compare this conclusion with the analysis in the text accompanying note 39 *supra*.

101. HOUSE REPORT, *supra* note 5, at 14. This statement was repeated twice in three paragraphs. *See also*, SENATE REPORT, *supra* note 4, at 5.

accomplishing the objectives of the new legislation, subsequent drafts amended the National Transportation Policy to include an explicit concern for efficiency as well.<sup>102</sup> While these may be mutually reinforcing concepts, the inclusion of a concept other than competition suggests that competition is not the primary or sole criterion to be employed by the Commission in performing its regulatory functions. Moreover, retention of some scheme of PC&N regulation as a condition precedent to lawful motor common carrier operation strongly suggests that unbridled competition is not what Congress wanted.<sup>103</sup> Thus, it appears that competition was intended to be an important policy consideration, but that competition was not intended to be the sole or even the primary objective of the Commission. Indeed, both "competition *and* efficiency in motor carrier operations [are] the most desirable means for achieving transportation goals."<sup>104</sup> The House report emphasizes:

[T]here may be situations where the Commission might find that concerns over efficiency would outweigh concerns over increased competition. For example, if problems of significant energy inefficiencies developed in some segment of the industry, the Commission might determine that the benefits of increased competition would be outweighed by the need to conserve fuel and to make that segment of the industry more energy efficient.<sup>105</sup>

The new statutory standard, by "lessening the burden of proof on applicants and correspondingly increasing the burden on persons opposing the application, will encourage new applicants to file for authority to provide needed service,"<sup>106</sup> and will encourage "existing trucking companies to expand their operations."<sup>107</sup> The Senate report goes so far as to insist that the legislative changes effectively establish a presumption that the issuance of proposed authority will be in the public interest.<sup>108</sup> The House did not go quite so far.<sup>109</sup>

102. SENATE REPORT, *supra* note 4, at 4-5. Congressman Harsha emphasized that "[w]hile competition is an important factor, additional competition, in and of itself, is not necessarily a sufficient basis for granting new authority." 126 CONG. REC. H5346 (daily ed. June 19, 1980).

103. However, the Senate committee fancifully noted that it "believes that while the marketplace is not perfect by any means, it is a better regulator of resources and services than a small group of bureaucrats in Washington, D.C." SENATE REPORT, *supra* note 4, at 3. This philosophy, if the Senate really believed it, would justify abolishing the ICC, and perhaps even leveling its building at Twelfth St. and Constitution Ave. and sowing the ground with salt. This, not even the Senate committee proposed to do. More realistic and believable are the committee's statements that it sought to reduce the governmental role. *See id.* at 1.

104. HOUSE REPORT, *supra* note 5, at 12 (emphasis added).

105. *Id.*

106. HOUSE REPORT, *supra* note 5, at 14. The use of the phrase "needed service" suggests that there must be some evidence of public need for the proposed operations, as required by the statute.

107. HOUSE REPORT, *supra* note 5, at 12. *See* SENATE REPORT, *supra* note 4, at 1.

108. SENATE REPORT, *supra* note 4, at 5.

With respect to the lessening of the burden of proof upon applicants, the House report explains:

Persons supporting the application will be required to come forward with some evidence of a public need or demand for the service. Under this standard, proponents of an application must show that the service they propose would serve a useful public purpose, responsive to a public demand or need.<sup>110</sup>

The report goes on to suggest that the manner in which this burden can be satisfied should be less stringent than that required by traditional evidentiary obligations:

For example, this demonstration could be made by public officials, shippers, receivers, trade associations, civic associations, consumers, and employee groups, as well as by the applicant itself. The normal way to establish this has been for applicants to submit evidence of some of those who would use the service proposed. The Committee thinks that this is still the most effective evidence. . . . However, the Committee does not intend to restrict the Commission in which factors it can consider in determining whether the proposed service is responsive to a public demand or need.<sup>111</sup>

However, it is important to note that the House insisted that a provision be included to require that applicants demonstrate a public need for the proposed operations. The Senate bill included no such provision,<sup>112</sup> and the House version prevailed.

Essentially, once the applicant has made a *prima facie* showing that the proposed service would serve a useful public purpose and that it is fit, willing and able to provide the proposed service, a presumption is created that the application is consistent with the PC&N. The House report strongly suggests that the presumption that new entry and competition are consistent with the PC&N arises only after the applicant has satisfied its evidentiary burden.

Once the applicant has satisfied this burden, the burden of proof then shifts to protestants who, if they are to prevail, must demonstrate that the proposed operations are inconsistent with the PC&N.<sup>113</sup> And

109. See HOUSE REPORT, *supra* note 5, at 14.

110. *Id.*

111. *Id.* at 14-15. The report goes on to specify that these factors include: "a need or demand for new services, innovative quality or price options, increased competition, greater fuel efficiency, improved service for small communities, improved opportunities for minorities, and any other benefits that would serve a useful public purpose." *Id.* at 15.

112. See SENATE REPORT, *supra* note 4, at 59.

113. HOUSE REPORT, *supra* note 5, at 15. Regarding this allocation of the burden of proof, the House report states:

The Committee believes that placing the burden of proof squarely on persons opposing issuance of the certificate is clearly required by today's conditions in the motor carrier industry. It is only the opposing carriers who are in a position to show the impact which a grant of authority will have on them, and it is logical to place upon them the

the protestants' burden cannot be satisfied *solely* by proving that there will be diversion of traffic or revenue should the proposed authority be granted.<sup>114</sup>

The relaxation of these entry criteria is not the only means whereby the new legislation has made it easier for motor carriers to enter the industry. For some types of shipments, "such as the transportation of food by independent owner-operators and the transportation of small shipments,"<sup>115</sup> Congress has eliminated the PC&N test altogether.<sup>116</sup> Further, Congress has expanded those areas wholly exempt from regulation, thereby constricting ICC jurisdiction,<sup>117</sup> and has directed the Commission to eliminate unreasonable territorial and commodity descriptions and restrictions.<sup>118</sup>

responsibility for developing the record and bearing the burden of producing the evidence with regard to these issues.

*Id.*

114. However, protestants may freely raise any element of the National Transportation Policy, 49 U.S.C.A. § 10101 (West Supp. 1981), to sustain their burden of proof. *Id.*

115. HOUSE REPORT, *supra* note 5, at 3. See *id.* at 9-10.

116. The Motor Carrier Act of 1980 permits the ICC to issue operating authority without PC&N scrutiny (*i.e.*, the applicant need merely demonstrate its fitness to perform the proposed operations) under the following circumstances: (a) where a community is not regularly served by a certificated motor carrier, 49 U.S.C.A. § 10922(b)(4)(A) (West Supp. 1981); (b) where a community suffers a loss of rail service via abandonment, *id.* § 10922(b)(4)(B); (c) movements of U.S. government property (except household goods, hazardous or secret materials, weapons and munitions), *id.* § 10922(b)(4)(C); (d) shipments weighing less than 100 pounds, *id.* § 10922(b)(4)(D); and (e) movements by owner-operators of food and fertilizer, *id.* § 10922(b)(4)(E).

117. See HOUSE REPORT, *supra* note 5, at 3. This author has elsewhere summarized the traditional areas of statutory exemption from regulation:

The Interstate Commerce Act exempts several areas of the motor carrier industry from regulation. Thus, although for-hire transportation is regulated, private carriage is not. While interstate and foreign commerce movements fall within the jurisdiction of the Interstate Commerce Commission, intrastate movements do not. The Act also provides exemptions for various types of agricultural interests, including farmers' vehicles, livestock and agricultural commodities, and agricultural cooperatives. Four exemptions are territorial in nature, including those involving incidental-to-air movements, and transportation within a terminal area, commercial zone, and within a single state. Finally, several additional statutory provisions exempt peripheral movements, including the transportation of newspapers, and wrecked vehicles, movements within national parks, school children, taxi cab and hotel service, and casual, occasional or reciprocal transportation. Beyond these significant statutory exemptions from regulation (which the ICC has generously expanded), the Commission has itself effectively deregulated major aspects of transportation, perhaps the most significant of which involve the movement of waste products, and the performance of non-household goods brokerage services.

The new legislation affirms or expands those exemptions involving private carriage, air terminal areas, agricultural products, and agricultural cooperatives. Further, the new legislation affirms the Commission's effective deregulation of incidental transportation and brokerage services. In addition to these changes, the Motor Carrier Act of 1980 also adds decorative rock and wood chips to the list of exempt commodities, and liberalizes the rules involving mixed loads of regulated and unregulated commodities.

Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 TRANSP. L. INST. 121, 123, 153-54 (1980) (citations omitted).

118. 49 U.S.C.A. § 10922(h)(1) (West Supp. 1981):

Having taken these major steps toward easing regulatory barriers to entry, Congress forcefully admonished the ICC not to stray beyond the bounds of the new legislation, and "to stay within the powers specifically vested in it by the revised law."<sup>119</sup> Congress also insisted that the new legislation "be implemented with the least amount of disruption to the transportation system as possible."<sup>120</sup> Congress was "extremely concerned over the effect that this Act may have on existing motor carriers and on the employees of these motor carriers."<sup>121</sup>

Concern with the possibility of an overly zealous Commission (potentially poised to launch *de facto* deregulation despite the congressional rejection of *de jure* deregulation)<sup>122</sup> along with concern that the

Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

Representative Harsha noted that these provisions are intended to allow removal of restrictions on a case-by-case basis, with the Commission considering individually filed applications. He went on to say:

This provision would allow the ICC to reasonably broaden, and I repeat, reasonably broaden . . . the categories of commodities which a carrier is authorized to transport. This provision is not intended to give the ICC the authority to generalize or standardize all commodity descriptions. It is intended to benefit individual carriers and shippers where such benefits can be proven.

126 CONG. REC. H5347 (daily ed. June 19, 1980).

119. HOUSE REPORT, *supra* note 5, at 11. "The congressional direction should be explicit and the ICC should be committed to staying within the explicit powers invested in it by the statute." SENATE REPORT, *supra* note 4, at 2-3.

120. See HOUSE REPORT, *supra* note 5, at 11. Representative Harsha declared that the new legislation represent "a gradual and balanced approach to the reform and modernization of our Nation's motor carrier regulatory system." 126 CONG. REC. H5344 (daily ed. June 19, 1980).

121. HOUSE REPORT, *supra* note 5, at 11.

122. Representative Schuster, one of the principle authors of the Motor Carrier Act of 1980, noted that "without this legislation, the ICC, the bureaucrats downtown, would proceed to deregulate the trucking industry." 126 CONG. REC. H5351 (daily ed. June 19, 1980). Representative Harsha reaffirmed these feelings when he said:

In the recent past, the ICC embarked upon a program to review and re-evaluate its longstanding interpretations and implementation of the Interstate Commerce Act. In effect, the ICC embarked upon a course of action to redefine completely and unilaterally our national transportation policies. This has contributed to the growing sense that the Government has become so large and unwieldy that it is virtually out of control. Moreover, there is a widespread belief that the ICC is oblivious to the wishes of Congress.

*Id.* at H5346. Representative Levitas expressed similar views in the House report. See note 68 *supra*.

legislation might have deleterious effects upon employment, the value of operating rights, service to small communities, and safety on the highways,<sup>123</sup> led Congress to promise that vigorous oversight would be conducted to monitor ICC activity and the results thereof, in order to "ensure that the end result of this legislation overall will be a benefit to the people of this country."<sup>124</sup> By promulgating this new legislation, Congress sought to give the ICC "explicit direction for the regulation of the motor carrier industry and to ease that industry's uncertainty about the future of regulation by the Commission."<sup>125</sup> Under the statutory scheme existing prior to 1980, the ICC held and exercised wide discretion in administering its regulatory responsibilities.<sup>126</sup> By establishing clearly defined parameters, such discretion might be constricted.<sup>127</sup> As stated in the House report, "Broad policy decisions of this type should be made by the Congress and should not be left to the discretion of the Commission."<sup>128</sup>

123. HOUSE REPORT, *supra* note 5, at 4-5. In order to ensure that small communities would continue to receive adequate service, Congress intended that the common carrier obligations be retained. Congressman Shuster noted that if the Congress allowed the ICC to continue on the path of *de facto* deregulation, without legislative constraint, this would mean that

particularly for the rural areas of America, we would find ourselves in a position where service would be under serious jeopardy. Many Members have come up to me over the past few weeks and expressed their deep concern about the impact of the airline deregulation on their districts and said they would be against this bill if it did the same thing that airline deregulation has done.

We were very mindful of this problem and for that reason this bill does not go the whole way with regard to deregulation. This bill does provide, and this is an extremely important point, this bill continues to provide for the common carrier obligation. If a common carrier today has a certificate requiring him to provide service to a particular area, be it rural or urban, he has that obligation under this legislation and that obligation continues. That is an extremely important aspect of the legislation before us.

126 CONG. REC. H5351 (daily ed. June 19, 1980). When questioned by Congressman Davis of Michigan, Representative Shuster responded:

The direction the ICC is going in now could lead us in the direction of *de facto* deregulation. It is the small areas of America which could be injured, and I emphasize that this bill keeps the common carrier obligation to serve. It does not touch that. It keeps it. And that is fundamental.

*Id.* at H5352.

124. HOUSE REPORT, *supra* note 5, at 10. *See also id.* at 4, 5 & 11; SENATE REPORT, *supra* note 4, at 4.

125. HOUSE REPORT, *supra* note 5, at 10-11.

126. SENATE REPORT, *supra* note 4, at 3.

127. As indicated by the Senate committee, "The congressional direction should be explicit and the ICC should be committed to staying within the explicit powers invested in it by the statute." *Id.* at 2-3.

128. HOUSE REPORT, *supra* note 5, at 13. As Congressman Harsha noted:

For too long, Congress has basically been on the sidelines, while the Interstate Commerce Commission exercised unduly wide discretion in regulating the Nation's motor carrier industry. Operating with the 1935 Statute, the ICC has found it difficult, no doubt, to determine Congressional intent in this area. Accordingly, in the past several years, it has made changes in the regulatory system on its own initiative, and in the absence of Congressional guidance, if not consultation.

The Motor Carrier Act of 1980 will correct that situation, for clearly, it was never

Congress clearly rejected total deregulation. While it eased the applicant's burden and correspondingly increased the protestants' burden in a manner similar to that taken by the ICC in Ex Parte No. MC-121, of which Congress generally approved,<sup>129</sup> Congress did "not relieve the Commission of its responsibility to consider each application on an individual basis."<sup>130</sup> Further, it specifically prohibited the "Master Certificate" approach of blanket authorization of operating authority to various segments of the industry.<sup>131</sup> Moreover, while the PC&N burden may have been eased in many contexts and eliminated in others,<sup>132</sup> the burden of proving both fitness, willingness, and ability to provide the proposed operations and that the proposed operations will satisfy a useful public purpose, responsive to a public demand or need, has by no means been diminished—it rests squarely with the applicant, as it always has.<sup>133</sup>

## V. THE ICC'S EXPANSION OF THE LEGISLATION

### A. *The Motor Carrier Act of 1980: A Statute of First Impression*

The first major decision by the ICC interpreting the new entry standards was *Art Pape Transfer, Inc., Extension—Commodities in End-Dump Vehicles*.<sup>134</sup> In *Art Pape*, the Commission made two major pronouncements in dicta. First, for cases pending at the time the Motor Carrier Act of 1980 was enacted, where evidence had been submitted

the intent of Congress that an unbridled Federal bureaucracy would control and set policy and guidelines for the conduct of interstate commerce. If long-standing precedents in the regulating of the motor carrier industry are to be overturned, as some have been recently, it must only be done in accordance with Congressional intent, and not in a show of agency independence.

Therefore, H.R. 6418 will give clear guidelines to the ICC on how to administer the law. In so doing, the Committee expects the Commission to stay within the explicit powers invested by the new Statute.

126 CONG. REC. H5345 (daily ed. June 19, 1980).

129. See HOUSE REPORT, *supra* note 5, at 13.

130. SENATE REPORT, *supra* note 4, at 6. Query whether Congress rationally would have retained case-by-case adjudication in operating rights proceedings had it expected the ICC to grant virtually every application filed.

131. *Id.* at 6. "Pursuant to that approach, the Commission makes one general finding of public need for a specific type of transportation without looking at the individual carriers and situations involved. Henceforth, the Commission will be obligated to look at each application and decide whether the transportation would be inconsistent with the public need." *Id.* See HOUSE REPORT, *supra* note 5, at 15.

132. See notes 116-117 *supra*.

133. See HOUSE REPORT, *supra* note 5, at 14; SENATE REPORT, *supra* note 4, at 5. Presumably, this retention is designed to alleviate potential problems with a carrier's ability to provide safe and reliable service, as well as its willingness to provide the proposed service and comply with the relevant statutory provisions.

134. 132 M.C.C. 84 (1980).



under the standards of the prior law, the ICC would examine that evidence under the entry standards existing prior to the new Act.<sup>135</sup> If the application would have been denied under those standards, the ICC would then examine the evidence under the criteria established by the Motor Carrier Act of 1980.<sup>136</sup>

Second, the Commission set forth its general interpretation of the new legislation:

As we read the new legislation, Congress has endorsed our recent initiatives in the area of motor carrier entry [and] has given us a mandate to move even further in appropriate cases. It is clear that Congress intends to make it easier for carrier [*sic*] to obtain new authority than was the case under the law in effect before July 1, 1980.<sup>137</sup>

This statement is a bit too generous however. It is true that Congress did endorse *some* of the ICC's recent initiatives (such as Ex Parte No. MC-121, which shifted to protestants the burden of proving an adverse impact upon their operations)<sup>138</sup> by codifying those portions of the *P.C. White* and *Liberty* opinions which demanded that protestants prove something more than traffic or revenue diversion,<sup>139</sup> and by affirming several of the ICC's efforts to expand particular exemptions from regulation.<sup>140</sup> But it goes too far to say, as the Commission did in

135. *Id.* at 93. "If the application passes muster under the old law, it will, except perhaps in extraordinary circumstances, pass muster under the new law." *Id.* See Ex Parte No. 55 (Sub-No. 43), 45 Fed. Reg. 45,534 (1980). See also Santini Bros., Inc.—Purchase—Trans-Universal Van Lines, Inc., 127 M.C.C. 712, 717 (1980); Tiger Transp., Inc., Extension—Points in Ten Midwestern States, 132 M.C.C. 281, 283 (1980).

136. 132 M.C.C. at 94. The Commission was "hard pressed to imagine circumstances in which an application would be granted under the old standards [and] be denied under the new." *Id.* at 94-95.

137. *Id.* at 93. Cf. Western Gillette, Inc., Extension—Louisiana, 132 M.C.C. 325, 332 (1980) (which focused on the issue of whether, under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), applications seeking essentially duplicative service should be consolidated, concluding that "it is possible that the 1980 Act will wholly eliminate consolidation of motor carrier applications." 132 M.C.C. at 332).

138. See text accompanying notes 62-65 *supra*; HOUSE REPORT, *supra* note 5, at 13-14.

139. See text accompanying notes 43-56 *supra*.

140. See note 117 and accompanying text *supra*. By creating a balanced system of entry which decreased the statutory burden on applicants and imposed the PC&N burden upon protestants, Congress affirmed the essential components of the *P.C. White* and *Liberty* precedents, but did little more, for the Commission had already gone that far in reversing the traditional approach. Congress did this in an effort to make entry easier than it was under either the traditional approach or under the 1935 Act, with which Congress had expressed general disapproval. See text accompanying notes 99-101 *supra*. The House report noted that "any regulatory statute that has not been significantly changed in 45 years would seem to be a candidate for revision." HOUSE REPORT, *supra* note 5, at 2. To a limited extent, (*i.e.*, to the extent that the new legislation explicitly expands the efforts to ease entry, such as, for example, the statutory elimination of the PC&N requirement in limited sectors of the industry) it can reasonably be argued that Congress intended to make entry easier than was the case under the law before July 1, 1980, when the Motor Carrier Act of 1980 became effective.

*Art Pape*, that this constitutes a "mandate to move even further." Congress has rejected many of the Commission's recent initiatives in the area of motor carrier entry and has forcefully insisted that the ICC remain within the specified boundaries of the new legislation.<sup>141</sup> Clearly, Congress has rejected the "Master Certificate" approach<sup>142</sup> and has insisted that the Commission proceed on a case-by-case basis. Further, the new statute requires that the Commission make specific findings both as to the effect of the issuance of operating authority on existing certificated carriers<sup>143</sup> and as to whether the proposed authority is consistent with the National Transportation Policy.<sup>144</sup> Both requirements are consistent with the congressional desire to ameliorate any deleterious effects of the new legislation upon existing carriers.<sup>145</sup> While Congress maintained competition as an important policy objective, the law as written requires that competition be coupled with other considerations, including efficiency, and thus, despite the holdings of *P.C. White* and *Liberty*,<sup>146</sup> competition must not be the overriding concern. Indeed, the legislative history indicates that protestants may raise concerns over efficiency which can outweigh an interest in enhancing competition.<sup>147</sup>

There is strong reason to suspect that, although the new legislation was liberal, it did not go as far as the Commission would have liked. The ICC has been specifically admonished not to stray beyond its boundaries in liberalizing entry. Hence, the Commission should not use the mechanism of legislative interpretation to confer upon itself authority to go further than Congress intended. Nevertheless, *Art Pape* suggests an effort to do precisely that.

In an interesting footnote to *Art Pape*, the Commission asserted:

Congress was aware that over the recent past the Commission had adopted a liberalized entry program, approving 96 to 98 percent of all applications. *See, e.g.*, "Additional Views of Congressman Allen E. Ertel," H. Rept. 96-1069, *supra*. Since Congress explained, in the words of the House Committee report, that "section 5 is designed to make it easier for new trucking companies to enter the market and existing companies to expand their operations . . .," it must have meant that the qualitative standards for entry were to be relaxed.<sup>148</sup>

141. *See* notes 119-128 and accompanying text *supra*.

142. *See* note 95 and accompanying text *supra*.

143. 49 U.S.C.A. § 10922(b)(2)(A) (West Supp. 1981).

144. *Id.* § 10922(b)(2)(B).

145. *See* HOUSE REPORT, *supra* note 5, at 11.

146. *See* text accompanying notes 43-56 *supra*.

147. *See* text accompanying note 105 *supra*.

148. 132 M.C.C. at 94 n.2.

This premise that Congress intended that the qualitative standards be relaxed cannot be accepted. A lessening of the burden of proof upon applicants does not mean that all or virtually all applications should be granted; similarly, increasing the statutory burden of proof upon protestants does not mean that all or virtually all protests should fail. If Congress had desired that all applications be granted, it would have eliminated the PC&N requirement for all sectors of the industry, rather than just a few. Further, it is interesting that the Commission cited Congressman Ertel's separate expression of opinion, for later in that opinion he explicitly rejected any notion that the legislation endorsed recent Commission initiatives in deregulating entry, insisting that "[t]he legislation recedes from the Commission's ambitious entry policies."<sup>149</sup>

### B. *The Protestant's Extraordinary PC&N Burden*

*La Bar's, Inc., Extension—Mountaintop Insulation*<sup>150</sup> was the first major decision which comprehensively described the Commission's interpretation of the protestants' burden under the 1980 legislation. In *La Bar's*, the ICC noted that "[t]he Motor Carrier Act of 1980 significantly altered the decisional framework in motor carrier licensing cases, placing increased importance on the role of competition in the national trucking industry."<sup>151</sup> The Commission further asserted that adequacy of existing services is now irrelevant in the determination of PC&N.<sup>152</sup> But the Commission cited nothing in the statute or its legislative history to support this statement. Even the federal courts, which over the years have admonished the ICC not to view the element of inadequacy of existing service as effectively synonymous with PC&N, have stated that inadequacy of existing service remains one of the elements to be considered, along with other factors including "the desirability of competition, the desirability of different kinds of service, and the desirability of improved service."<sup>153</sup>

Presumably, the Commission interprets the effective elimination of the second *Pan-American* criterion, coupled with the codification of the

149. HOUSE REPORT, *supra* note 5, at 99.

150. 132 M.C.C. 263 (1980).

151. *Id.* at 267 (footnotes omitted). The ICC here may be ignoring the legislative history and statutory language which indicate that both competition *and* efficiency are equally important considerations in determining whether operating authority should be issued. See text accompanying notes 101-104 *supra*.

152. 132 M.C.C. at 269.

153. *Trans-American Van Serv., Inc. v. United States*, 421 F. Supp. 308, 320-21 (N.D. Tex. 1976); *Nashua Motor Express, Inc. v. United States*, 230 F. Supp. 646, 653 (D.N.H. 1964).

first and third criteria,<sup>154</sup> as reflective of a congressional intention that the ICC should no longer give any weight to the issue of whether existing services are inadequate.<sup>155</sup> But if this was indeed the congressional intention, it must be asked why Congress did not specifically eliminate the ability of the ICC to consider the element of inadequacy of service in the same way that it restricted the importance the ICC could place on traffic or revenue diversion. The 1980 Act provides, "[T]he Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity."<sup>156</sup> The statute does *not* provide that the ICC "shall not find diversion of traffic or revenue from an existing carrier or *inadequacy of existing service* to be in and of itself inconsistent with the public convenience and necessity." The doctrine of *expressio unius est exclusio alterius*<sup>157</sup> would seem to militate against the Commission's conclusion that inadequacy of existing service is now irrelevant under the new legislation.

On the facts before the Commission in *La Bar's*, the protestant strongly contended that its future was "dependent upon the outcome of this application. Granting the application will undoubtedly cause [protestant's] financial ruin."<sup>158</sup> Nevertheless, in a five step analysis, the ICC found that the protestant had failed to meet its burden and that, therefore, the application should be granted. First, the Commission found the fact that the supporting shipper had come to rely increasingly upon the applicant's services performed under temporary authority demonstrated not only that the applicant's services must be different from the protestant's, but also that benefits obviously would be derived from increased competition.<sup>159</sup> This is a quantum leap in logic by the Commission. It suggests that a shipper's desire for the applicant's services is sufficient by itself to demonstrate the benefits of increased competition.

Focusing on the financial plight of the protestant in *La Bar's*, the Commission noted that the applicant had also recently suffered a

154. See text accompanying notes 84-86 *supra*.

155. Alternatively, the Commission might be relying upon Ex Parte No. MC-121, which eliminated consideration of the element of adequacy of existing service, and with which Congress expressed general approval.

156. 49 U.S.C.A. § 10922(b)(2)(B) (West Supp. 1981).

157. *Expressio unius est exclusio alterius* is a maxim of statutory construction meaning that the expression of one thing is the exclusion of another. Under this maxim, if a statute specifies one exception to a general rule or the effects of a certain provision, other exceptions or effects are excluded. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

158. 132 M.C.C. at 270.

159. *Id.* at 271.

financial loss. "Considering financial health alone, one could just as easily argue that the application should be granted because a denial would prevent applicant from offering an expanded service in an attempt to improve its financial plight," declared the Commission.<sup>160</sup> But this analysis cannot be passed over without closer scrutiny. The protestant in *La Bar's* already operated in the involved territory, and it may already have made a significant investment in terminals and equipment, all of which might be lost in bankruptcy with the applicant's new entry. The applicant, on the other hand, had not made such an investment to serve the territory. Should not the carrier who has the most to lose be the focus of the Commission's financial analysis? Moreover, does it make sense to place two unhealthy carriers into a market which can support only one?<sup>161</sup>

160. *Id.*

161. If competition is to be the principal policy focus of the ICC, how much competition is too much competition? In other words, under the Commission's approach, can excessive competition have deleterious effects upon the public? One would suspect not. In *Western Gillette, Inc., Extension—Louisiana*, 132 M.C.C. 325 (1980), the ICC addressed the validity of the *Ashbacker* doctrine (conceived in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)) in ICC entry proceedings. The *Ashbacker* doctrine requires that, "as an element of procedural due process, contemporaneously filed conflicting applications before an administrative agency . . . must be consolidated for concurrent decision where the applications are for mutually exclusive authority." 132 M.C.C. at 333. In *Western Gillette*, the Commission noted in dictum the possibility that the Motor Carrier Act of 1980 may wholly eliminate the need to consolidate motor carrier entry applications, both because of a more liberal entry standard and the legislation's new strict procedural deadlines. *Id.* at 332. The ICC proceeded to reverse the prior decision of Division I to grant authority to only one of the three applicants, by granting duplicative authority to all three.

Similarly, in *Continental Contract Carrier Corp. Extension—Modification of Permit*, 132 M.C.C. 141 (1980), the ICC granted authority in a small market already served on two carriers, noting that the "protestants' position rests on the assumption that our concern for increased competition ends when two carriers are authorized to serve the involved market. This position is incorrect from the point of view of present Commission policy and also in terms of basic economics." *Id.* at 146-47. As to the value of competition, the Commission declared that "the public interest demands efficient, vigorous competition in the motor carrier industry. This, indeed, is the mandate of the Commission in the age of the energy crisis." *Id.* at 146. This author has taken issue with this very point. As he has noted elsewhere:

True, there is some price elasticity between modes or between carriers. For example, in a market which can economically and efficiently support a single carrier, that carrier may be able to provide truckload movements on a regular basis. Inherently, this is an optimum transportation-shipper relationship from the standpoint of fuel efficiency. Recently, the ICC has been vigorously certificating new entrants as if the commodities market were infinite. The aggregate effects of these thousands of Lilliputian decisions, coupled with the Commission's efforts to encourage price competition, may cause aggregate fuel consumption to rise dramatically. In our example, three carriers might compete for traffic that one handled before. By lowering their prices, each might be able to acquire approximately one-third of the market; and if they provide service comparable to the level previously performed by the incumbent, they may each be able to have their trucks one-third full, at least until one or all drop out of the market or go bankrupt. In the meantime, fuel consumption has risen by 300 percent.

Nevertheless, price competition may be able to attract traffic from competing modes. But to the extent traffic leaves rail and enters trucks, fuel efficiency is sacrificed (for in long haul transportation, rail is an inherently more fuel efficient mode), and the egregious financial posture of rail carriage is made more hopeless.

The Commission in *La Bar's* went on to elaborate the criteria that protestants must prove if they are to prevail. According to the Commission, protestants must not only demonstrate a financial loss, but they must also present "evidence conclusively demonstrating (1) that the loss was attributable to the applicant's operations, (2) that the losses were certain to continue beyond the year in question, and importantly [*sic*], (3) that there were no economy or marketing measures that the protestant could have taken to eliminate the loss."<sup>162</sup> Further, the protestant "must not only show harm from additional competition, it must show that its ability to serve the public will be jeopardized."<sup>163</sup> In *La Bar's*, the Commission said that with the promise of the shipper that he would "continue to tender large amounts of traffic to the protestant . . . the protestant [had] failed to demonstrate that granting the application [would] foreclose it from adapting its operation to handle this reduced but still substantial volume of traffic."<sup>164</sup> In essence, the protestant had failed to show that the new competition would drive it into bankruptcy.<sup>165</sup>

*Erosion of the Regulatory Process, supra* note 67, at 313 n.39.

162. 132 M.C.C. at 271. The Commission noted that "[e]ven under the rules of law in effect prior to the enactment of the new Motor Carrier Act, these three points had to be shown to indicate a connection between applicant's proposal and protestant's fortunes." *Id.* The Commission cited no authority to sustain this proposition.

163. *Id.* at 271-72. See *Tiger Transp., Inc., Extension—Points in Ten Midwestern States*, 132 M.C.C. 281, 284 (1980).

164. 132 M.C.C. at 272. In the subsequent decision of *Western Gillette, Inc., Extension—Louisiana*, 132 M.C.C. 325 (1980), the Commission elaborated:

[T]o warrant denial of an application, a protestant must introduce more than mere evidence of revenues that it now enjoys and may lose to the applicant—evidence that simply indicates that it has been fulfilling its obligation to provide service under its authority. There is no presumption that traffic will be diverted or that revenue will be lost simply because competition is authorized. A protestant thus has the burden of offering some convincing explanation of why and how authorization of competitive service will lead to substantial traffic diversion and material revenue loss. Moreover, a protestant must also demonstrate that the potential loss of revenue will affect its operations in a manner adverse to the public interest.

*Id.* at 343-44. See also *Continental Contract Carrier Corp. Extension—Modification of Permit*, 132 M.C.C. 141, 147 (1980), *Santini Bros., Inc.—Purchase—Trans-Universal Van Lines, Inc.*, 127 M.C.C. 712, 717 (1980). Cf. *Greyhound Lines, Inc., Extension—Special Operations, Atlantic City*, 132 M.C.C. 196, 209, 211 (1980) (involving an application for regular route passenger authority).

165. 132 M.C.C. at 272. In *P.A.K. Transp., Inc., Extension—New England Wood, Forest and Lumber Products*, 132 M.C.C. 253 (1980), the Commission noted:

While protestant claims that 100 percent of its involved traffic would be diverted, there is nothing in the record to indicate that authorization of the competitive service will lead to diversion of this traffic, or the effect this would have on protestant's overall operations or ability to compete. . . .

. . . Competition frequently involves a loss of customers, but ordinarily it is in the public interest. Injury to an existing carrier through competition becomes relevant only when there is a corresponding injury to the public.

*Id.* at 258-59.

Even if it had, the Commission's decision in *La Bar's* suggests that this would not be enough to warrant a denial of the application. Citing *Liberty* and *Arrow*, the ICC insisted "that the protestant must show that injury to it involves some harm to the public interest. After all, injury to existing carriers through competition becomes relevant only when there is a corresponding injury to the public."<sup>166</sup> Even the forced bankruptcy of an existing carrier would not warrant a denial of an application for motor common carrier authority:

Confronting the protestant with more vigorous competition—indeed, even competition which forces an existing carrier out of business—does not automatically cause harm to any aspect of the public interests. Congress, after all, requires us to foster efficiency in motor carrier transportation and there may be situations in which, considering the transportation industry as a whole, it is preferable to replace an inefficient operator with a more efficient one and promote the introduction of innovative services or prices.<sup>167</sup>

Nothing in the evidence suggested that the protestant in *La Bar's* was an "inefficient operator" (unless, of course, the pecuniary losses sustained by the protestant as a result of the applicant's operations are interpreted as demonstrative of inefficiency), that the applicant was more efficient than the protestant, or that the applicant proposed to introduce innovative prices or services. Nevertheless, the Commission concluded that "the connection between harm to carriers and the public harm must be made explicit, and certainly no connection is evident here."<sup>168</sup>

Commissioner Clapp, while expressing his general approval of the

166. 132 M.C.C. at 272. See *Continental Contract Carrier Corp. Extension—Modification of Permit*, 132 M.C.C. 141, 144 (1980).

167. 132 M.C.C. at 272.

168. *Id.* Two observations are warranted. First, evidence adduced by the applicant showing public need can be speculative and vague and will still be accepted by the Commission as convincing. In contrast, evidence offered by protestants must be definite, precise, and well documented. Second, when the Commission refers to "injury to the public," it apparently does not consider carriers, their owners, or their employees as members of the public. The Commission in *La Bar's* went on to state:

We realize that a grant of this application will cause protestant to lose certain traffic that is [*sic*] now handles. That loss is difficult to assess but may be substantial in the short run if protestant loses still further traffic. However, by altering the size of its fleet to reflect business conditions or any diversion that might occur, or by expanding service to other shippers, protestant has a reasonable chance of adjusting successfully to its altered circumstances. A loss to the public has not been shown. The major shipper affected, CertainTeed, obviously finds the potential loss less than the gain from granting the sought authority. The shipper has made the determination that on balance the decreased reliance on existing carriers is a benefit that outweighs any potential losses. There is no specific evidence that other shippers will suffer any loss. Thus, on balance, we conclude that a grant of the sought authority is in the public interest.

*Id.* at 272-73.

gradual easing of barriers to entry that had characterized the Commission's approach prior to the promulgation of the 1980 Act (to the extent that this approach "has encouraged increased competition and better service to the public"), strongly disagreed with and was highly critical of the majority's gross expansion of that effort in *La Bar's*:

[T]his decision exceeds the bounds of reason when it asserts that not even a bankruptcy—and the resulting loss of service of existing competing carriers—is sufficient to show "an explicit connection" between harm to carriers and harm to the public. This may be true in some cases but, for instance, when the result of a grant is merely the substitution of one large carrier for another smaller one, have we truly met the public interest to "allow a variety of quality and price options to meet changing market demand \* \* \*?" Does this enable carriers to "earn adequate profits, attract capital, and maintain fair wages and working conditions?" Would the closing of local terminals and termination of small, possibly rural routes, serve to "provide and maintain service to small communities and small shippers" or "improve and maintain a sound, safe, and competitive privately owned motor carrier system?" These are all considerations of 49 U.S.C. 10101(a) of the new act.<sup>169</sup>

In a manner reminiscent of the parallel dismay suffered by Richard O'Melia, who, as a member of the Civil Aeronautics Board, frequently and vigorously dissented from the majority's excessive efforts to liberalize entry in aviation,<sup>170</sup> Commissioner Clapp continued:

The dicta in this decision primarily lays out what is not sufficient to make the connection between harm to existing carriers and harm to the public. But what *is* required to make this connection? I am at a loss to think of anything a protestant could do to meet this burden. Is the majority saying there are no circumstances under which we will protect a competing carrier and that the sole criterion for entry is the prima facie case? It would seem so. If so, then the concept of the protested proceeding—which I might note has been retained in the 1980 act—is a charade which wastes everyone's time and resources. If not, and if there is relevance left to protests, we must tell existing carriers what their burden is and what we consider public harm. Any other approach is an abdication of our duty.<sup>171</sup>

What then could a protestant prove to demonstrate that injury to existing carriers also constitutes some injury to the public?<sup>172</sup> The quasi-judicial burden imposed by the ICC upon protestants in *La Bar's*

169. 132 M.C.C. at 273.

170. See *Rise and Fall*, *supra* note 4, at 146, 151-57.

171. 132 M.C.C. at 273-74.

172. Even if there was proof that the applicant's proposed operations would "likely promote inefficiency and waste or destroy [protestants'] ability to compete," *May Trucking Co. v. United States*, 593 F.2d 1349, 1356 (D.C. Cir. 1979), it is questionable whether this would be sufficient to warrant a denial under the rational of *La Bar's*.



goes far beyond that mandated by the Motor Carrier Act of 1980 or its legislative history. Apparently, there is little, and indeed, perhaps nothing at all, that a protestant can prove which will convince the ICC that the public would be injured by the inauguration of new services.

During the first year of implementing the Motor Carrier Act of 1980, some 27,000 opposed motor carrier operating rights cases were decided by the ICC. In not a single case did the Commission conclude that the protestant had satisfied its statutory burden of proving that the proposed operations were inconsistent with the public convenience and necessity. The logical inference is that protestants are now wasting their time participating in proceedings they cannot win. This is certainly not what Congress intended. Had Congress desired this result, it surely would not have retained case-by-case PC&N procedures in so large a segment of the industry.

### C. *The Applicant's De Minimis Public Need Burden*

Having made protestants' burden so onerous, the Commission began to make the applicant's burden exceedingly light. It must be remembered that the Motor Carrier Act of 1980 imposed upon applicants the evidentiary burden of proving that the proposed service "will serve a useful public purpose, responsive to a public demand or need."<sup>173</sup> This was, in essence, a codification of the first *Pan-American* criterion.<sup>174</sup> It could, therefore, be argued that Congress intended that the ICC follow the precedent established under the first *Pan-American* criterion, including the applicant's prima facie obligations enunciated in *Novak*.<sup>175</sup> It is true that Congress noted that its statutory standards diminished somewhat the burden of proof on applicants,<sup>176</sup> but it did this by transferring the PC&N evidentiary obligation from applicants to protestants. Congress also indicated that the applicant could meet its burden by producing evidence through entities other than supporting shippers.<sup>177</sup> Beyond these two provisions, however, Congress did not lessen the evidentiary burden of applicants. The admonition by Congress that the Commission should not exceed the boundaries established by the 1980 Act<sup>178</sup> therefore suggests that the ICC must not stray beyond the first criterion of *Pan-American*, except to accept evidence

173. 49 U.S.C.A. § 10922(b)(1)(B) (West Supp. 1981).

174. See text accompanying notes 84-85 *supra*.

175. See text accompanying notes 18-19 *supra*.

176. See text accompanying note 106 *supra*.

177. See note 111 and accompanying text *supra*.

178. See text accompanying notes 119-128 *supra*.

offered in support of an application by those other than supporting shippers.

The ICC first described the applicant's post-1980 Act burden in *Art Pape*, where it acknowledged that "the applicant must still come forward with some evidence of the utility of its proposed service."<sup>179</sup> However, the Commission seemed to feel that less evidence should be required of an applicant, and that a broader scope of operating authority, from both a commodity and a territorial perspective, should be granted to an applicant than had been the case prior to the promulgation of the 1980 legislation. Although the administrative law judge had granted a certificate to transport only the fourteen specified commodities for which a public need had been demonstrated, the Commission in *Art Pape* expanded the commodity description to authorize the transportation of "*commodities, in bulk in dump vehicles*."<sup>180</sup> The ICC felt that the judge's approach was "unduly restrictive and results in an impractical and ineffective fragmentation of applicant's operating abilities. It also fails to accord sufficient weight to the apparent need for comprehensive motor carrier service to enable users . . . to expand their operations."<sup>181</sup> Thus, it appears that the Commission wanted to give a sufficiently broad grant of operating authority so that the applicant would not need to come back to the agency at some future date to request that its authority be expanded. A broad grant at the outset would, in the ICC's estimation, allow users to expand their operations.<sup>182</sup>

The ICC further elaborated on its desire to grant broad authority

179. 132 M.C.C. at 94. The ICC continued:

Congress no longer intends that we rely exclusively on methods of evidentiary support—notably, shipper statements—which have ordinarily been required in the past. An applicant may present the Commission with statements of public officials, receivers, trade associations, civic associations, consumers, and employee groups, as well as statements by the applicant itself. The Commission, in measuring the sufficiency of these evidentiary submissions, may consider the need for increased competition, minority opportunities, innovative pricing and service, fuel efficiency and improved service for small communities in determining whether a threshold case has been amply set forth.

*Id.* at 94.

180. *Id.* at 100 app. (emphasis in original).

181. *Id.* at 96.

182. *Id.* The ICC specifically stated that it

has always sought to act under the general policy of issuing grants of authority with broad commodity and territorial descriptions to enable a carrier to render shippers and the public a complete transportation service. Broad grants of authority also take cognizance of technological modifications, changing industrial patterns, and future needs, and allow carriers to meet the changing needs of shippers and receivers, market demands, and the diverse requirements of the shipping public.

*Id.* (citations omitted).

in terms of the territory in which the applicant would be authorized to operate:

Similarly, when an applicant for a certificate seeks new authority to provide transportation to many localities in a large geographic area, we have not traditionally required that it demonstrate a specific need for service at each point. There is no requirement that data on public need and benefit be gathered for every village and hamlet in the area of proposed operations before a certificate of such encompassing scope be awarded. All that is required is that the applicant submit evidence which is sufficiently representative of the transportation needs of the shipping public in the relevant market to enable us to make an informed determination of the public interest in a given case.<sup>183</sup>

In support of this approach, the Commission noted that Congress had conferred on it the authority to remove restrictions and broaden authorities on motor carrier certificates.<sup>184</sup> Further, the ICC stated its belief that Congress intended that all new grants include "reasonably broad commodity and territorial descriptions as well."<sup>185</sup>

In *P.A.K. Transport, Inc., Extension—New England Wood, Forest and Lumber Products*,<sup>186</sup> the Commission implemented these policies by granting statewide operating authority to transport specified commodities between points in Connecticut, New Hampshire, New York, Rhode Island, and Vermont,<sup>187</sup> despite the fact that the shipper had only adduced evidence supporting a public need for service "from nine origin points in New Hampshire to one point each in Maine and New York and two points in New Hampshire, and from three origin points in Vermont to one point each in New York, Maine and New Hampshire."<sup>188</sup> Even though the commodities only moved from the facilities of the supporting shippers, the Commission refused to limit the origin points to the sites of the shippers' facilities,<sup>189</sup> apparently ignoring the precedent established by the judiciary in *Refrigerated Transport*.<sup>190</sup> Moreover, in *Tiger Transportation, Inc., Extension—Points in Ten Mid-western States*,<sup>191</sup> the ICC put the burden of proving the desirability of

183. *Id.* (citations omitted).

184. *Id.* See 49 U.S.C.A. § 10922(h)(1)(B) (West Supp. 1981).

185. 132 M.C.C. at 96-97. See also *Green Field Transp. Co. Extension—General Commodities*, United States, 132 M.C.C. 485 (1981); *Tri-State Motor Transit Co. Extension—General Commodities*, United States, 132 M.C.C. 504 (1981); *Consolidated Freightways, Inc.*, 132 M.C.C. 320 (1980).

186. 132 M.C.C. 253 (1980).

187. *Id.* at 260 app. A.

188. *Id.* at 258.

189. *Id.*

190. See text accompanying notes 80-81 *supra*.

191. 132 M.C.C. 281 (1980).

a restriction upon the protestant.<sup>192</sup> This is indeed curious, for if the statute provides that the burden of proving a public need for the proposed operations is on the applicant, it seems clear that the burden of demonstrating that no restriction should be imposed would also rest upon the applicant.

Further, in *Tiger*, the Commission acknowledged that

the public need expressed for service at points in California is considerably less than that expressed for service in the other four origin States; that six of the seven protestants are performing service from points in California; and that relatively few of the supporting shippers' complaints pertain to service from California.<sup>193</sup>

Nevertheless, the Commission proceeded to reverse the administrative law judge's exclusion of California from the territorial scope of the authority.<sup>194</sup>

The Commission has extended this policy of expansion of territorial and commodity descriptions in two major proceedings. In *Ex Parte* No. MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*,<sup>195</sup> the Commission established procedural rules for the generous expansion of existing operating authorities. In *Ex Parte* No. 55 (Sub-No. 43A), *Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)*,<sup>196</sup> it proceeded to issue a parallel set of standards in the form of a policy statement applicable to the commodity and territorial descriptions encompassed in new motor carrier operating authority applications. Both of these actions were purportedly based upon the 1980 Act which requires the Commission to

implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

192. The Commission said that "where, as here, an applicant has established by substantial evidence that there is a public need for the proposed operations, there is an implied recognition that the proposed operation will not be restricted, unless protestants show by substantial evidence that, absent the imposition of a considered restriction, they would be materially adversely affected." *Id.* at 285. However, in *Continental Contract Carrier Corp. Extension—Modification of Permit*, 132 M.C.C. 141 (1980), the Commission imposed "originating-at/destined-to facilities restrictions," *id.* at 147, presumably because the applicants had originally sought contract carrier application, and issuance of broader authority would have required republication in the *Federal Register*.

193. 132 M.C.C. at 284.

194. *Id.* In a separate opinion, Commissioner Gilliam noted his "reservations over the lack of specificity in the supporting data." *Id.* at 288.

195. 132 M.C.C. 114 (1980), 45 Fed. Reg. 86,747 (1980) (to be codified in 49 C.F.R. §§ 1002 & 1137) [hereinafter cited as *Restriction Removal*].

196. 45 Fed. Reg. 86,798 (1980) [hereinafter cited as *Future Policy*].

(i) *reasonably* broaden the categories of property authorized by the carrier's certificate or permit;

(iv) eliminate *unreasonable* or *excessively narrow* territorial limitations; or

(v) eliminate any other *unreasonable* restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.<sup>197</sup>

Thus, the essential issue is whether the Commission acted reasonably in these two proceedings.

The most salient provisions of the first proceeding, the *Restriction Removal* decision, provide that broad, generic commodity descriptions, no less comprehensive than those in the Standard Transportation Commodities Code<sup>198</sup> may be substituted for any narrower commodity description presently contained in a certificate.<sup>199</sup> Further, all restrictions traditionally imposed on a general commodity authority have now been deemed by the Commission to be unreasonably narrow, ex-

197. 49 U.S.C.A. § 10922(h)(1)(B) (West Supp. 1981) (emphasis added).

198. The current version of the Standard Transportation Commodities Code (STCC), containing twenty-nine categories of commodities, appears in Appendix A of the *Future Policy* statement:

*STCC*

- 01—Farm Products
- 08—Forest Products
- 10, 14—Ores and Minerals
- 11, 29—Coal and Coal Products
- 13, 29—Petroleum, Natural Gas and Their Products
- 19—Ordnance and Accessories
- 20—Food and Related Products
- 21—Tobacco Products
- 22, 23—Textile Mill Products
- 24—Lumber and Wood Products
- 25—Furniture and Fixtures
- 26—Pulp, Paper and Related Products
- 27—Printed Matter
- 28—Chemicals and Related Products
- 30—Rubber and Plastics Products
- 31—Leather and Leather Products
- 32—Clay, Concrete, Glass or Stone Products
- 33, 34—Metal Products
- 35, 36—Machinery
- 37—Transportation Equipment
- 38—Instruments and Photographic Goods
- 40—Waste or Scrap Materials Not Identified by Industry Producing
- 49—Hazardous Materials
  - General Commodities (except Classes A and B Explosives)
  - Commodities in Bulk
  - Those Commodities Which Because of Their Size or Weight Require the Use of Special Handling or Equipment
  - Household Goods
  - Building Materials
  - Mercer Commodities

45 Fed. Reg. at 86,807.

199. 45 Fed. Reg. at 86,759 (1980) (to be codified in 49 C.F.R. § 1137.21(b)).

cept those involving explosives.<sup>200</sup> Finally, any territorial description smaller in scope than a county is deemed to be excessively narrow.<sup>201</sup>

These standards have been generally extended in the latter proceeding, the *Future Policy* statement, as a general policy prospectively governing the filing of applications for new operating authority. As to commodity descriptions, the Commission noted:

[W]e expect applicants to employ commodity descriptions which are at least as broad as the [STCC]. Our Employee Boards will screen applications to ensure that broad commodity descriptions are being used. . . . Carriers are to be able to perform as complete a service as possible for shippers, with competition—not narrowly limited authority—defining the boundaries of service.<sup>202</sup>

Thus, competition, rather than government regulation, will determine what service licensed carriers will provide. Moreover, the Commission refuses to accept not only the general commodity restrictions described above, but virtually any other restrictions as well, including those limiting service to the facilities of a particular shipper, thus effectively reversing *Refrigerated Transport*. The Commission described its new policy in a most omniscient manner: "The decisional standards for Commission action have been substantially changed by the Motor Carrier Act of 1980 and we believe that the critical underpinnings of the new law support our *modest* expansions of the geographic descriptions in most cases."<sup>203</sup>

The expansions, however, are hardly "*modest*." Perhaps the best way to explain how far these decisions take the industry is to provide a hypothetical example. A carrier that, under the old rules, could establish a *prima facie* case of shipper need for transportation of, for example, roller skates from the Ajax Skate Company at Fairburn, Georgia to specified facilities in Hialeah, Florida would, under the Commission's new rules, presumably receive authority to carry any type of transportation equipment from Fulton County, Georgia to Dade County, Florida. The former county includes most of Atlanta; the latter includes Miami. Does this not diminish the applicant's burden of demonstrating public need, despite the fact that the Motor Carrier Act of 1980 specifically retained that obligation? With such a certificate, the carrier would be free to transport automobiles between Miami and Atlanta,

200. *Id.* (to be codified in 49 C.F.R. § 1137.21(a)).

201. *Id.* (to be codified in 49 C.F.R. § 1137.24(a)).

202. *Future Policy*, *supra* note 196, at 86,799. "[W]e expect applicants to seek authority much more extensive than the minimum. Grants for entire States would tend to obviate recognition problems." *Id.* at 86,803.

203. *Id.* at 86,802 (emphasis added).

even though it had proffered no evidence to support such authorized transportation.

But it is not actually necessary to dream up hypothetical factual situations to illustrate this point, for in implementing this new policy, the Commission has begun to amend applications already on file in order to bring them into conformance with the new policy. For example, Wiley Sanders Truck Lines, Inc., filed an application seeking authority to transport general commodities (except classes A and B explosives) between points in the United States (except Alaska and Hawaii) restricted to traffic originating at or destined to the facilities of three companies. By notice in the *Federal Register* of February 11, 1981, the application was conditionally granted between points in the United States without limitation.<sup>204</sup> This probably constitutes more authority than the applicant will ever want or need and is certainly more than is dictated by any reasonable showing of public need. And this is not an isolated instance.<sup>205</sup> Yet the burden now falls upon protestants to demonstrate that the public interest warrants reimposition of restric-

204. MC-138882 (Sub-379F), 46 Fed. Reg. 11,920 (1981).

205. See, e.g., Brief for Brannan Systems, Inc. at app. A, *American Trucking Ass'ns, Inc. v. United States*, 642 F.2d 916 (5th Cir. 1981).

For example, an applicant seeking authority to transport charcoal would have his application published in the *Federal Register* by the Commission to reflect the appropriate STCC classifications, even over his objection that the STCC commodity descriptions were far broader than the authority he actually desired. If the Commission's employees were unsure whether the charcoal was wood based or coal based, both STCC classifications (24—Lumber and Wood Products, and 11, 29—Coal and Coal Products) would be published. See note 198 *supra*. Thus, what might otherwise have been an unopposed application for the movement of charcoal would become a proceeding opposed by protestants holding authority to transport lumber and bulk carriers of coal, causing the applicant to incur unnecessary expense in litigating an opposed application before the Commission.

Other examples are abundant. As the recently appointed chairman of the Commission has noted:

In oversight hearings held by Congress during June of 1981, the Commission was roundly chastized for its practices of giving motor carriers much greater authority than they had sought. Congress made clear that while it did not want the Commission arbitrarily to restrict grants of authority, it certainly did not want the Commission unilaterally to grant substantially more authority than requested by an applicant or warranted by his supporting evidence. . . .

Numerous examples exist of instances in which the Commission, during the first year of administering the Motor Carrier Act of 1980, gave an applicant much broader authority than the applicant even requested. One person who sought authority to transport light fixtures was given the right to haul machinery. A garage in Maryland which desired to transport wrecked, disabled and recovered stolen vehicles and replacement vehicles received authority to carry transportation equipment. There are literally hundreds of other cases involving similar decisions.

A company in Illinois sought authority to haul fertilizer and anhydrous ammonia and got the right to haul all chemical and related products. A Colorado carrier wanted to transport beer, and got authority to haul food and related products. And a Texas carrier who wanted to haul toys, cabinets, and crushed stone, got authority to haul general commodities.

tions.<sup>206</sup> As the Commission has noted:

Once a decision-notice is published in the *Federal Register* . . . applicant will ordinarily receive the authority unless the protestants can show fitness problems or that the grant would be inconsistent with public convenience and necessity. Protestants have a difficult burden to bear, whereas applicant has already done all that is expected of it. . . .<sup>207</sup>

This approach thwarts the clear intent of Congress in enacting the Motor Carrier Act of 1980. Congress left with the applicant the evidentiary obligation of proving a public need for proposed operations, but the Commission now seeks to issue operating authority which from both a commodity and a territorial perspective is far broader than the public need so established. Nothing in the statute or its legislative history suggests a congressional intent that either restriction removal or the commodity and territorial liberalization procedures could be used to grant enormous segments of operating authority far broader than the public need for service established by the applicant. Indeed, the normal means of granting operating authority is on a case-by-case basis, not by extraordinary statements of expansive policy. The ICC here is approaching master certification, a deregulatory effort which Congress found so distasteful that it absolutely forbade it and admonished the Commission never again to stray beyond the limits of the legislation. The Commission is proceeding as if there had been no such admonition. If the Commission continues on this course of *de facto* deregulation, it will destroy the fundamental components of economic regulation of the motor carrier industry.<sup>208</sup>

Position Paper of Chairman Reese H. Taylor, Jr. Regarding Implementation of the Motor Carrier Act of 1980, at 9 (Aug. 14, 1981) [hereinafter cited as Position Paper].

The Commission itself has admitted that its decision in Ex Parte No. 55 (Sub-No. 43A), *Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)*, 45 Fed. Reg. 86,798 (1980), to abandon its traditional policy of restricting general commodities authority by excluding household goods

has caused many general commodity applications to be protested by household goods carriers and then appealed to the federal courts, thereby adding substantially to the length of time and cost required to receive a grant of authority. In addition, some applicants for general freight carrier authority have been given household goods authority despite their specific representations that they do not want to haul household goods.

Letter from ICC Chairman Reese H. Taylor, Jr. to Representative Glenn M. Anderson, Chairman, Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation (Oct. 26, 1981) at 66-67.

206. See note 192 and accompanying text *supra*.

207. *Future Policy*, *supra* note 196, at 86,804.

208. Commissioner Clapp noted the magnitude of the *Restriction Removal* proceeding in his partial dissent to that proceeding which appears at 46 Fed. Reg. 2,294 (1981):

[T]he use of this proceeding by existing carriers seeking to expand authority may cause more significant changes in the nation's transportation system than any other section of the 1980 Motor Carrier Act. For example, general commodities carriers may now enter



Among those components is the common carrier obligation. If Wiley Sanders Truck Lines is to receive nationwide general commodities authority, how is it to respond to a request for the bulk transportation of granite between Seattle and Boston, or for the transportation of frozen foods between Baltimore and Denver when it operates neither dump nor refrigerated vehicles and is not prepared to serve those parts of the country? Will it not violate its common carrier responsibilities if it fails to meet these requests for service? This scenario could pose significant pragmatic difficulties for the Commission in its efforts to initiate such an ambitious policy of certificate authorization. In its *Future Policy* decision, the ICC announced that it did "not believe that the common carrier obligation present [*sic*] a problem."<sup>209</sup>

A little more than one month later, however, the ICC apparently regained its senses and realized that the common carrier obligation does present a problem. However, rather than solving the problem by issuing authority commensurate with the public need for service, as intended by Congress, the Commission instead launched Ex Parte No. MC-77 (Sub-3), *Elimination of Certificates as the Measure of "Holding Out"*,<sup>210</sup> a proceeding which seeks to dilute the common carrier obligation.<sup>211</sup> As has been indicated, Congress clearly intended that the com-

the household goods and bulk areas with ease while many carriers, formerly limited by size and weight restrictions, may now expand into the general commodities arena. All of this and more can be accomplished without the necessity of the application proceeding required of new entrants.

*Id.* at 2,294-95.

209. *Future Policy*, *supra* note 196, at 86,800.

210. 46 Fed. Reg. 8,604 (1981) (to be codified in 49 C.F.R. § 1310) [hereinafter cited as *Common Carrier Obligation*].

211. Under the common law, anyone who undertook the responsibility to transport, for hire, the property of the general public was deemed to be a common carrier and to be liable as an insurer for loss or damage of the commodities. Thus, in *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858), a common carrier was defined as

one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey.

*Id.* at 22. Implicit in this definition is the notion that such a carrier has an obligation to accept on a nondiscriminatory basis all shipments tendered, barring a reasonable excuse for refusal, such as an "act of God or the public enemy." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344, 381 (1848). See *Montgomery Ward & Co. v. Northern Pac. Term. Co.*, 128 F. Supp. 475, 490 (D. Or. 1953), 128 F. Supp. 520, 521-22 (D. Or. 1954).

Although the concept apparently rose out of an obligation imposed in return for the conferment of monopoly status, *Allnut v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810), the justification for the burdens gradually expanded into the broader objective of protecting the public interest. In essence, the public was deemed to have an interest in the property of those who devoted it to a public purpose. See Braden, *The Story of the Historical Development of the Economic Regulation of Transportation*, 19 ICC PRAC. J. 659, 660-61 (1952). Thus, as the United States Supreme Court emphasized in its seminal decision of *Munn v. Illinois*, 94 U.S. 113 (1876):

Looking, then, to the common law . . . we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago . . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good . . . .

*Id.* at 125-26. See *Chicago & Northwestern Ry. v. People*, 56 Ill. 365 (1870). Further, the obligation was imposed to prevent discrimination by carriers favoring one shipper's traffic over another. See R. MERRIAM, *THE LAW OF CARRIERS OF GOODS* 21 (1914). Such a quasi-public enterprise as transportation, analogous to a public utility, could not be freed to "choose their patrons to the exclusion of others [for] they are obligated to serve the general public equally." *Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp.*, 165 F. Supp. 67 (S.D. Ind. 1958). See Flood, *Common Carriers' Duty to Serve Strike-Bound Plants*, 24 ICC PRAC. J. 30 (1956).

These fundamental concepts, derived at common law, were embraced in the Act to Regulate Commerce, which established the ICC and conferred on it jurisdiction over rail carriers in 1887. See *American Trucking v. Atcheson, Topeka & Santa Fe Ry.*, 387 U.S. 397, 406 (1967); *Hewitt v. New York, N.H. & H. R.R.*, 284 N.Y. 117, 29 N.E.2d 641 (1940). They were expanded with the promulgation of the Motor Carrier Act of 1935. See 49 U.S.C.A. §§ 10102(12), 10741, 10762, 10922, 11101 (West Supp. 1981); *Thomson v. United States*, 321 U.S. 91 (1944).

The issuance of a certificate of public convenience and necessity not only confers a privilege to engage in lawful transportation, but it also imposes an obligation to serve those members of the public who need motor carrier transportation. Hence, the ICC has consistently held that in order to adequately protect the public, common carriers must be held strictly accountable for their performance. See *National Furniture Traffic Conference v. Associated Truck Lines, Inc.*, 332 I.C.C. 802 (1968), *aff'd sub nom. Associated Truck Lines, Inc. v. United States*, 304 F. Supp. 1094 (W.D. Mich. 1969), *aff'd*, 397 U.S. 42 (1970). Further, the ICC has insisted that upon reasonable request, carriers must perform the operations described in their certificates of public convenience and necessity. *Braswell Motor Freight Lines, Inc., Investigation of Practices*, 118 M.C.C. 392 (1973); *A.C.E. Freight, Inc.—Investigation and Revocation of Certificates*, 115 M.C.C. 96 (1962); *Chamber of Commerce of St. Joseph, Mo. v. Red Ball Express Co.*, 91 M.C.C. 513 (1962); *Buhr—Revocation of Certificate*, 62 M.C.C. 774 (1954). Failure to serve those points embraced in the certificate could result in the revocation of the carrier's certificate or any portion thereof. *Powell Bros. Truck Lines, Inc.—Purchase—John B. Bryan*, 39 M.C.C. 11 (1943). Where the carrier did not wish to serve a particular area, it could apply for voluntary revocation of any part of its certificate, see 49 U.S.C.A. § 10925 (West Supp. 1981), or seek an embargo, see 49 C.F.R. § 1059.1 (1980). However, it was not permitted to alter its tariff provisions in order to limit the type of shipments it would haul. 49 C.F.R. § 1307.27(k) (1980); *Ex Parte No. MC-77, Restrictions on Service by Motor Common Carriers*, 111 M.C.C. 151 (1970). In *North Central Truck Lines, Inc. v. ICC*, 559 F.2d 802 (D.C. Cir. 1977), the court upheld the ICC's rejection of a tariff which would have limited the carrier's operations to less than that described in its certificate, saying, "Common carriers have an obligation to accept all shipments submitted to them within their authority and cannot restrict the services they furnish the public to less than the full services authorized by their certificate." *Id.* at 805. Another significant component of the common carrier obligation is the requirement that all shippers be served without discrimination. *A.L. Kauffman Extension of Operations—Toledo, Ohio*, 30 M.C.C. 517 (1941). A common carrier would not be permitted to limit its service to a group of preferred shippers, *Fishback Trucking Co., Common Carrier Application*, 61 M.C.C. 539 (1953), or enter into any agreement with competitors providing that it would serve only certain specified shippers, *Canny Trucking Co., Common Carrier Application*, 17 M.C.C. 559 (1939). However, where the carrier has equipment limitations, it has been held that it need not provide specialized service for every imaginable commodity described in its certificate. For example, in *Travenol Laboratories, Inc., Petition for Investigation*, 121 M.C.C. 588 (1975), *aff'd sub nom. Adhesives and Sealant Council, Inc. v. ICC*, 546 F.2d 1042 (D.C. Cir. 1976), the Commission concluded that because of the unique nature of perishable commodities, it would not be unreasonable for general commodities carriers to elect not to acquire and maintain temperature controlled equipment.

Carriers which interlined their less desirable traffic rather than make the pickups and deliveries themselves to points identified in their certificates were deemed not to have fulfilled their

mon carrier obligation should not be diluted.<sup>212</sup>

This rulemaking, the *Common Carrier Obligation* proceeding, begins with an interesting interpretation of the new legislation: "The traditional Commission responsibility for the careful administration of competitive relationships has been changed [by the Motor Carrier Act of 1980] to place greater emphasis on competition and potential competition as a principal regulatory device."<sup>213</sup> This interpretation is somewhat spurious. The Motor Carrier Act of 1980 preserved the Commission's responsibility for the careful administration of competitive relationships by insisting on a case-by-case adjudication of entry proceedings and by requiring a careful balancing of the effects of competition upon both applicants and protestants, and with respect to the latter, by insisting on a specific finding as to "the effect of issuance of the certificate on existing carriers."<sup>214</sup> Moreover, the new legislation does not mandate that competition must become the principal regulatory device. The National Transportation Policy speaks only in terms of promoting "competitive and efficient transportation" in order to effectuate the other objectives specified therein.<sup>215</sup>

The ICC, in the *Common Carrier Obligation* rulemaking, acknowledged that its *Future Policy* decision would

have the effect of broadening commodity and territorial descriptions in certificated authorities, and prohibiting many restrictions in certifi-

common carrier obligation. The certificate holders themselves were required to establish adequate service to all their authorized service points, even though there might be insufficient traffic to make such operations profitable. T.I.M.E.-DC, Inc.—Investigation and Revocation of Certificates, 113 M.C.C. 897 (1971); Pacific Intermountain Express, Inc., Investigation of Practices, 96 M.C.C. 604 (1964). However, where alternative transportation opportunities are available, the Commission has not been so stringent in forcing carriers to fulfill to the full extent of their common carrier obligation. And the Commission has given some relief to long-haul carriers through its approval of pooling arrangements, enabling one or a few short-haul carriers to serve light-volume points as agents of several long-haul carriers. T.I.M.E.-DC, Inc.—Investigation and Revocation of Certificates, 123 M.C.C. 274 (1975); Consolidated Freightways Corp., Pooling, 109 M.C.C. 596 (1971).

The Commission summarized these concepts in Associated Transp., Inc., Extension—T.V.A. Power Plant, 113 M.C.C. 637 (1971):

In general, these provisions embody the common law obligations of common carriers to carry all goods offered for transportation and to serve all shippers without discrimination, within the terms of their certificates, and to the best of their abilities. To this end, each certificate of public convenience and necessity is conditioned upon the holder's rendering a reasonably continuous and adequate service to the public pursuant to the authority therein granted. . . . Subject to the carrier's capacity, authority, permissible tariff limitations, and certain factors beyond its control, the obligation is an absolute one.

*Id.* at 640-41. See also *Reno Chamber of Commerce v. Consolidated Freightways Corp.*, 88 M.C.C. 796 (1962).

212. See note 123 *supra*.

213. *Common Carrier Obligation*, *supra* note 210, at 8,605.

214. 49 U.S.C.A. § 10922(b)(2)(B) (West Supp. 1981).

215. *Id.* § 10101(a)(7).

cated authorities. Under the framework of Ex Parte No. 55 (Sub-No. 43A) motor common carriers of property will receive grants of authority generally broader in scope than those which have been issued in the past.

The new grants often will exceed the authority which the carrier actually needs to perform a particular transportation operation. It will clearly be much more common in the future than in the past to find carriers who lack the capacity to provide more than a portion of the services they are authorized to provide. This is the natural result of reliance on a policy of potential competition, eased entry, and broader grants of authority.<sup>216</sup>

Hence, the Commission acknowledges that its new policies will result in the issuance of operating authorities broader in scope than that for which a public need has been shown. However, the Commission goes on to note the severe problems which may arise as a result of this approach:

If our approach were to remain unchanged, and if failure to provide service coextensive with certificate authority were still seen to give rise to a potential violation of the carrier's obligations, then the issuance of certificates intentionally broader in scope than immediately proposed operations would be a "Catch 22" of unusual proportions. We are certain, however, that Congress intended no such result in enacting section 10922(h) to broaden certificates grants. It remains then only to disconnect the issue of holding out from the issuance of certificate authority, which requires foremost the designation of an acceptable substitute for the certificate.<sup>217</sup>

The ICC then proceeds to suggest that whatever the common carrier obligation is, it should be wholly divorced from the operating authority the carrier holds itself out as possessing by virtue of the commodities and territory embraced in its certificate of public convenience and necessity.

It is not difficult to agree with that portion of the above quotation which recognizes that Congress would not have intended such a "Catch 22" result when it promulgated legislation reasonably broadening ex-

216. *Common Carrier Obligation*, *supra* note 210, at 8,605. The Commission also maintained that several provisions of the Motor Carrier Act of 1980

effectively shift the emphasis in administering the competitive relationships among carriers to marketplace competition and potential competition as principal regulatory devices, subject to continuing Commission jurisdiction. Since the policy proposed in Ex Parte No. 55 (Sub-No. 43A), *Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)*, has been adopted, carriers' authorities will shortly be couched as generic categories rather than as specific commodities. Coupled with the liberalized entry criteria set forth in the Act, and the national transportation policy sought to be achieved, market competition becomes a self-regulating system which ensures the shipping public of needed transportation services.

*Id.* at 8,606.

217. *Id.* at 8,605.

isting operating authority. What creates the dilemma is not the congressional effort to remove unreasonable operating authority provisions; it is instead the Commission's zealous effort to unreasonably broaden certificate grants. The problem would not exist had the ICC followed the legislative intent. Even more amazing is the Commission's description of the assurances the carrier's common law obligation to serve would now entail:

This proposal would rely on the shipper's efforts to obtain satisfactory service, and market competitive conditions to maintain it. Under this proposal, a simple refusal to provide service would not carry a presumption of public harm. Instead, a complainant would have to demonstrate the absence of alternatives, the likelihood of a long-term failure of service, an intent by the carrier to harm by discrimination, or some other form of unfair practice before the Commission would challenge the carrier's allocation of its resources to other markets or customers.<sup>218</sup>

Finally, in *Pre-Fab Transit Co. Extension—Nationwide General Commodities*,<sup>219</sup> the Commission effectively destroyed the traditional notion of the applicant's burden of proving public need by eradicating the *Novak* evidentiary guidelines.<sup>220</sup> In a self-serving way, the Commission purports to recognize that

[w]hile Congress clearly did not intend to make entry into the transportation industry synonymous with automatic grants of authority, the statute reflects Congress' intent to make it substantially easier for applicants to obtain certificates. There need simply be some showing that the proposed service would serve a useful public purpose, responsive to a public demand or need.<sup>221</sup>

"Some showing" of public need, as the Commission goes on to define it, includes virtually any sort of evidence, or self-serving statements about "innovative rate proposals, means by which the new authority would help rationalize their operations and make them more efficient, the amount of fuel likely to be saved, small communities and rural areas to be served, or marketing surveys showing prospective customers who might use the service if authorized."<sup>222</sup>

What then has become of the applicant's burden? How have these decisions diluted it? The answer to these questions is disturbing, for, in essence, the Commission has so diluted the applicant's burden that the only substantive burden that remains is one of simply filing an applica-

218. *Id.* at 8,606.

219. 132 M.C.C. 409 (1981).

220. See notes 18-19 and accompanying text *supra*.

221. 132 M.C.C. at 411.

222. *Id.* at 413.

tion for operating authority. The Commission seems willing to accept even the most insubstantial evidence to support an application for extremely broad authority. The burden then shifts to protestants to prove that such a grant would be inconsistent with the PC&N—a burden that cannot realistically be met.

## VI. CONCLUSION

The ultimate question, of course, is whether, during the first year of its implementation of the Motor Carrier Act of 1980, the ICC has adhered to the will of Congress as expressed in the statute and its legislative history. The succinct answer to that question is no. Congress did not intend to make the applicant's burden so incredibly light, and the protestants' burden so onerously heavy, that virtually every application for motor common carrier authority would be granted. *De facto* deregulation of entry is what the Commission has undertaken, despite the explicit congressional rejection of *de jure* deregulation. The Commission perceives the promotion of competition as the only salient purpose of the legislation. The Commission apparently believes that all of the other purposes of the Motor Carrier Act of 1980 can best be achieved by unbridled competition.

Commissioner Clapp has effectively agreed with this characterization of the ICC's approach, by lamenting, "I am concerned . . . that fair play, due process, and, indeed, the dictates of the 1980 Motor Carrier Act have been submerged beyond recognition in the race to prove to all that we as a Commission favor competition in the market place."<sup>223</sup>

Certainly, competition is and should be an important component of national transportation policy. In part, this concept was incorporated in the statute in order to encourage the ICC to steer clear of the excessively protective notions of regulation developed between 1935 and 1977. The principles developed during that era were responsible for a high level of service competition but had led to insufficient price competition and unnecessarily circuitous route limitations. However, unfettered competition would, in essence, constitute the absence of regulation. Whatever the merits of total decontrol of economic regulation, the Motor Carrier Act of 1980 did not constitute deregulation. It instead calls for a moderate and carefully balanced approach to licensed entry in order to accomplish the several objectives specified in the new

223. Ex Parte No. 55 (Sub-No. 43), Rules Governing Applications for Operating Authority, 46 Fed. Reg. 2,294 (1981) (Clapp, Comm'r, concurring in part, dissenting in part).

legislation, objectives which may not always be attainable in an open market. These include safety, sound economic conditions (enabling "efficient and well managed carriers to earn adequate profits, attract capital, and maintain fair wage and working conditions"), reasonable and nondiscriminatory rates, adequate service to small communities and small shippers, and greater participation in the industry by minorities.<sup>224</sup> The retention of a regulatory scheme of case-by-case adjudication of entry applications, in which the Commission is specifically required to consider both the impact of new entry upon existing carriers and whether the objectives of the National Transportation Policy are being served, "contradicts the notion that national policy unqualifiedly favors competition."<sup>225</sup>

The Commission has served its own purposes by focusing only on those portions of the National Transportation Policy and the legislative history which favor increased reliance on competition. Despite repeated congressional admonitions, the Commission has far exceeded the boundaries of the legislation in order to attain the increased level of competition which it perceives as being in the national interest. The Commission's responses to requests that it focus on the legislative intent have been astonishing. For example, the Commission has insisted:

The system of a Federal Government and administrative agencies does not rely exclusively on the legislative branch of government for all development of policy. The guiding statutory principles contained in the Interstate Commerce Act provide the Commission with a framework for decisions. With that framework, the Commission must render decisions based on *its view* of legislative intent and *its judgment* in the matter, educated by experience, and supported by

224. See 49 U.S.C.A. § 10101 (West Supp. 1981). Former ICC Chairman A. Daniel O'Neal summarized the attributes of economic regulation as follows:

Motor carrier regulation provides a basis for determining and assuring minimum levels of service to all parts of the country at a reasonable rate; even if the demand for trucking services in small towns or in intercity areas, or by small shippers, that would not justify the same level of service at the same level of rates. By so doing, regulation promotes the economic development of less populated areas. Regulation, by preventing unjust discrimination, can prevent large shippers and large carriers from exercising their market power to compel preferential treatment, where that treatment is not justified by lower costs. The regulatory role adds a measure of stability to the industry by providing a forum for the discussion of changes. Also, it can operate to reduce concentration in the industry by affording a measure of protection to smaller carriers.

Those are significant virtues and they can be realized only if the Government plays a role in allocating economic resources through the regulatory process.

*Economic Regulation of the Trucking Industry: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 33 (1979) (statement of Chairman A. Daniel O'Neal).

225. *Trans-American Van Serv., Inc. v. United States*, 421 F. Supp. 308, 323 (N.D. Tex. 1976) (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953)).

consonant findings.<sup>226</sup>

Thus, the Commission's view and judgment is that competition, and competition alone, will best serve the national interest, despite what Congress may erroneously have thought about the desirability of preserving a regulatory structure which would administer a carefully balanced system of entry. The Commission apparently must believe that its view and its judgment are far superior to those of Congress regarding the transportation system. A statement made by Congressman Levitas in 1980 is even more pertinent today: "[T]he Interstate Commerce Commission has ignored [congressional] actions and gone on its own merry arrogant way."<sup>227</sup>

There are three solutions to the Commission's *ultra vires* behavior: (1) stringent congressional oversight, in which errant Commissioners are fiercely admonished before the relevant subcommittees; (2) judicial review, in which the Commission's excesses are expeditiously reversed; and (3) presidential appointment of individuals who are dedicated to following congressional intent to fill the numerous vacancies which presently exist on the ICC. If the regulatory structure is to be preserved, these "checks" on aberrant administrative action must be employed. If they are not, neither the industry nor the public it serves, nor even the democratic process, will be well served.

## VII. EPILOGUE

Subsequent to the submission of this article but prior to its publication, several events occurred which are worthy of review. First, during the summer of 1981, both the House and Senate oversight committees conducted hearings on the implementation of the Motor Carrier Act of 1980. During the House hearings, the Commission was "roundly chastized for its practice of giving motor carriers much greater authority than they had sought."<sup>228</sup> Congressman Albosta went so far as to introduce a resolution expressing the feeling of Congress "that the Interstate Commerce Commission is not implementing the Motor Carrier Act of 1980 as Congress intended" and admonishing the ICC once again to remain within the boundaries established by Con-

226. Ex Parte No. 373, Impact of Commission Decisions on Small Businesses, 132 M.C.C. 74, 78 (1980) (citation omitted and emphasis added). Compare this statement with that of Congressman Harsha that "it was never the intent of Congress that an unbridled Federal bureaucracy would control and set policy and guidelines for the conduct of interstate commerce." 126 CONG. REC. H5345 (daily ed. June 19, 1980).

227. HOUSE REPORT, *supra* note 5, at 97.

228. See Position Paper, *supra* note 205, at 9.



gress.<sup>229</sup> The Senate oversight hearings were quite different, with Senators Packwood and Cannon urging the Commission essentially to continue the course and pace of *de facto* deregulation of the trucking industry established during the first year of the Act's implementation. Again, however, it must be remembered that the Senate failed to secure passage of its more liberal bill and acquiesced in the enactment of the more conservative House measure as the final version of the Motor Carrier Act of 1980.<sup>230</sup>

Second, President Ronald Reagan appointed Reese H. Taylor, Jr. as Chairman of the ICC.<sup>231</sup> As Chairman, Mr. Taylor publically declared, "I took an oath to uphold the law that I have been charged with administering, and I look forward to implementing vigorously the letter and spirit of the reform legislation enacted in 1980."<sup>232</sup>

Finally, the United States Court of Appeals for the Fifth Circuit recently addressed the issue of whether the Commission's major actions implementing the Motor Carrier Act of 1980 "are within the wide discretion imparted to it by the statute, or whether, on the other hand, they exceed or transgress the congressional mandate."<sup>233</sup> Significantly, the court held that both the Commission's *Restriction Removal* and *Future Policy* decisions<sup>234</sup> are "improper because they exceed the statutory direction to *reasonably* broaden existing certificates" and are "invalid as beyond the Commission's authority."<sup>235</sup> The court ac-

229. H.R. Res. 172, 97th Cong., 1st Sess. (July 9, 1981).

230. See text accompanying notes 96-98 *supra*.

231. The new chairman of the ICC asked the author to take a six month leave of absence from the University of Denver College of Law in order to serve as his legal advisor. See *ICC Nominations: A New Deregulation Test*, BUS. WEEK, July 20, 1981, at 58; *ICC Held Overstepping Bounds*, J. COM., July 9, 1981; *Chairman Reese Taylor Moves to Halt Trucking Industry Deregulation*, WALL ST. J., Aug. 5, 1981, at 50. While serving as Chairman Taylor's legal advisor, the author delivered a speech before the Chicago Transportation Club in which he summarized his feelings on several of the matters discussed in this article:

Let me tell you what I hope history will record about this era for the transportation industry and for the Interstate Commerce Commission. I hope that we can one day look back on these events and say something meaningful about the democratic process: that Congress, as an institutional embodiment of the democratic will, carefully reviewed the existing relationship between the transportation industry on the one hand and government on the other, and as the representative of the democratic will, it promulgated legislation seeking to guide one of its arms. And I believe that we can say that, during this era, it was a government of law and not of men that determined the course of transportation policy in the United States.

Address by Paul Dempsey, Chicago Transportation Club Educational Luncheon (Nov. 10, 1981).

232. Letter from Reese H. Taylor, Jr. to Cliff W. Krueger (Aug. 13, 1981).

233. *American Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 459 (5th Cir. 1981). The court properly noted that "[t]he delegation of power to administrative agencies is essential to the implementation of legislative policy in a complex society. Yet Congress knew that governors must themselves be governed and regulators regulated." *Id.* at 462.

234. See text accompanying notes 195-215 *supra*.

235. 659 F.2d at 475 (emphasis in original).

knowledge that the new legislation liberalized the entry criteria by shifting the burden of proving inconsistency with the PC&N to protestants.<sup>236</sup> Nevertheless, said the court, Congress did not diminish the dual burdens on applicants to demonstrate both that they are fit, willing, and able to provide the proposed service and that there is a public need for the proposed service.<sup>237</sup> "Presumably aware that such a presumption went beyond either business reality or its statutory powers,"<sup>238</sup> the court said, the ICC nevertheless promulgated rules insisting that carriers accept certificates embracing excessively broad commodity and territorial descriptions, even when such operating authority exceeded that which the applicants sought.<sup>239</sup> The court emphasized that it was "unable to find support in the statutory language for the Commission's conclusion that it was required, or even authorized, to implement the policies of the Motor Carrier Act by granting to new applicants the very broad authority it prescribes."<sup>240</sup>

The Commission had proffered three rationales in support of its

236. "There is no doubt that the Motor Carrier Act, while continuing the policy of industry regulation, was designed to change the Commission's authority and the operating practices of the industry. Congress desired to reduce, but not to eliminate regulation." *Id.* at 459. *See id.* at 470.

237. "In mandating the removal of unreasonable restrictions, the statute does not dispense with the primary requirement that every carrier be 'fit, willing, and able to provide the transportation to be authorized by the certificate.'" *Id.* at 464. "The retention of this standard, tested by forty-five years of interpretation, was deliberate." *Id.* at 469.

238. *Id.* at 465.

239. *See id.* at 471 n.99.

240. *Id.* at 469. For example, as to the Commission's insistence that carriers seeking general commodities authority also be given authority to transport household goods, the court noted:

In light of the historical recognition of household goods transportation as a specialized service requiring special equipment and highly trained and skilled workers, as well as the adoption of special regulatory requirements applicable solely to household goods carriers, it is illogical and unreasonable for the Commission to permit any general commodities carrier to perform household goods transportation without any further demonstration of its fitness, willingness, and ability to perform such service.

*Id.* at 467.

Similarly, as to the ICC's requirement that such carriers also accept authority to transport bulk commodities, the court concluded:

[T]he Commission has exceeded its statutory mandate . . . Bulk service requires special equipment, such as tank trucks, that many carriers do not have. Moreover . . . most carriers are not fit to provide bulk service because they will not have the proper cleaning facilities for tank trucks and in the case of hazardous bulk materials . . . will not know the appropriate safety regulations for handling bulk items, or have satisfied the special insurance limits pertaining to hazardous materials.

*Id.* at 473. *See id.* at 465.

As to the Commission's adoption of essentially mandatory STCC commodity descriptions, the court held, "The Commission may not . . . require all applicants regardless of circumstances to fit Procrustean descriptions, and it may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification is fit, willing, and able to carry all commodities in that classification." *Id.* at 472. The regulations promulgated by the Commission "[make] it likely that a carrier with authority to transport only one commodity who desires to transport only one additional commodity would be required to seek authority for an entire class of commodities,

issuance of broad authority, saying that narrowly defined authority (1) increases fuel use, (2) dulls competition, and (3) increases the likelihood of unnecessary regulation and corresponding economic loss. To this, the court responded: "[The Commission's] objectives may be laudable. They would be served even better by the complete removal of all licensing requirements. Congress did not, however, see fit to deregulate motor carriage. Indeed, it explicitly forbade the Commission to go beyond the powers vested in it by statute. . . ."241

some of which the carrier may not wish to transport or may lack the ability to transport." *Id.* at 462.

Finally, as to the ICC's refusal to issue nationwide authority to less than all fifty states, the court stated:

[T]he notion that any carrier fit, willing, and able to transport throughout the continental forty-eight states is ipso facto fit, willing, and able, by intermodal service or otherwise, to provide service to Alaska, 2,385 miles by land from the northernmost point of Washington State to Anchorage, and to Hawaii, 2,392 miles by sea or air from San Francisco, defies logic. The Commission's decision obviously rests on the stimulation of competition, a goal that cannot be exalted above all others, for . . . were it the sole objective, there would be no certificates. Accordingly, we hold this automatic authority provision to be invalid.

*Id.* at 474.

241. *Id.* at 470. "The House Report reviewed the efforts of the Commission in the recent past to reevaluate its historic approach to entry standards, and then stated, '[b]road policy decisions of this type should be made by the Congress and should not be left to the discretion of the Commission.'" *Id.* at 469.